C 1.12/3:3/23

Volume 3, No. 23, Pages 6471 to 6731,
November 7 - November 18, 1988.

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FEDERAL COMMUNICATIONS COMMISSION

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Citation Form: 2 FCC Rcd 1 (1987)

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J,
Section 76.501 of the Commission's
Rules and Regulations to Eliminate
the Prohibitions on Common Ownership
of Cable Television Systems and
National Television Networks

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING REPLY COMMENTS

Adopted: November 1, 1988; Released: November 4, 1988

By the Chief, Mass Media Bureau:

1. On September 6, 1988, the Commission released a *Further Notice of Proposed Rule Making* [1] in the above-captioned proceeding, proposing to eliminate Section 76.501(a)(1) of the Commission's Rules, which prohibits the common ownership of cable television systems and national television networks. The deadlines set for filing comments and reply comments in this proceeding were October 24, 1988, and November 8, 1988, respectively.

2. On October 26, 1988, a motion for extension of time for filing reply comments in this proceeding was submitted by CBS Inc. (CBS). The motion requests that the deadline for filing reply comments be extended by two weeks until November 22, 1988.

3. CBS contends that a two-week extension of time would facilitate the preparation of more useful pleadings in response to the various issues raised in more than 15 sets of comments, thereby contributing to an overall improvement in the quality of the record in this proceeding.

4. As set forth in Section 1.46 of the Commission's Rules,[2] it is our policy that extensions of time for filing comments in Rule Making proceedings shall not be routinely granted. However, given the large number of comments filed in this proceeding and because the requested extension appears reasonably necessary to adequately respond to these comments, we believe that good cause exists for granting CBS's motion.

5. Accordingly, IT IS ORDERED, that the motion for extention of time filed by CBS Inc. IS GRANTED and that the time for filing reply comments IS EXTENDED to November 22, 1988.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] FCC 88-271, released September 6, 1988, 3 FCC Rcd 5283 (1988), *summarized*, 53 Fed Reg. 36080 (September 16, 1988).

[2] 47 C.F.R. Section 1.46 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 31, 1988

FCC ANNOUNCES 1989 MAXIMUM REIMBURSEMENT FEE FOR AN AMATEUR OPERATOR EXAMINATION

The FCC announced today that effective January 1, 1989, the maximum allowable reimbursement fee for an amateur operator examination will be 4.75. This amount is based upon a 4.2% increase in the Department of Labor Consumer Price Index between September 1987 and September 1988.

Volunteer examiners (VEs) and volunteer-examiner coordinators (VECs) may charge examinees for out-of-pocket expenses incurred in preparing, processing or administering examinations for Technician, General, Advanced and Amateur Extra operator examinations. The amount of any such reimbursement fee from any examinee for any one examination session, regardless of the number of elements administered, must not exceed the maximum allowable fee. Where the VEs and the VEC both desire reimbursement, they jointly decide upon a fair distribution of the fee.

No fee is allowed for the Novice operator examination.

This announcement is made pursuant to Section 97.36 of the Commission's Rules, 47 C.F.R. § 97.36.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INCORPORATED — File No. I-T-C-88-202

Application for authority to lease and operate facilities for direct service to Singapore.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 31, 1988; Released: November 7, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on September 6, 1988, by Graphnet, Incorporated, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between the U.S. and Singapore and beyond. The application was placed on public notice on September 21, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Singapore by Graphnet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-202 IS GRANTED, and Graphnet is authorized to:

a. lease and operate a one-half interest in eight telegraph-grade circuits in previously authorized IRC bearer circuits between the U.S. and Singapore;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide Graphnet's regularly authorized services between the U.S. and Singapore and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Graphnet and its correspondent in Singapore, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alpha Lyracom, d/b/a PAN AMERICAN SATELLITE — File No. CSS-84-004-P(LA)

Final Authority to Operate an International Fixed-Satellite System for Communication Between Specified Geographical Areas

ORDER

Adopted: October 28, 1988; Released: November 7, 1988

By the Chief, Common Carrier Bureau:

1. In the Separate Systems decision, the Commission stated that it would not issue final authority for operation of any separate system until one or more foreign authorities had authorized use of the system and the Commission had been informed by the Department of State that the United States has fulfilled its obligations under Article XIV(d) of the INTELSAT Agreement.[1] The Commission's authorizations to separate system applicants have been so conditioned. By this order, we find that Alpha Lyracom d/b/a Pan American Satellite (PAS) has fulfilled these conditions with respect to specified countries and may begin to operate its facilities for communications to those countries.

2. On July 25, 1985, the Commission granted PAS conditional authority to construct and operate a sub-regional Western Hemisphere satellite system.[2] PAS proposed to offer international fixed-satellite facilities for communications between the United States and Latin America and dedicated domestic capacity within South America. The Commission modified this conditional authority on May 16, 1986, to permit PAS to acquire and reconfigure an RCA Astro 3000 Series Satellite fitted with eighteen 4/6 GHz transponders and six 11/14 GHz transponders as its initial satellite at the 45' W.L. orbital location. The Commission, however, denied PAS's request to utilize the 11/14 GHz transponders for communications between the United States and Western Europe without prejudice to filing a further request. [3] On September 30, 1987, the Commission authorized PAS to begin operation of the satellite's five 4/6 GHz transponders for communications between the United States and Peru consistent with the INTELSAT Article XIV(d) consultation completed in April 1987.[4] In addition, on February 16, 1988, PAS was granted conditional authority to operate the six 11/14 GHz transponders for communications between the United States and Western Europe.[5] The Commission stated that it would not authorize PAS to begin operation to Western Europe until the United States fulfilled its Article XIV(d) obligations with respect to the six 11/14 GHz transponders.

3. On October 20, 1988, we received a letter from the Department of State informing us that additional Article XIV(d) consultations had been completed with regard to the PAS satellite. The State Department said that the United States fulfilled its Article XIV(d) obligations for operation of the PAS satellite's six 11/14 GHz transponders for communications between the United States and the United Kingdom, Ireland, the Federal Republic of Germany, Sweden and Luxembourg and for operation of the five 4/6 GHz transponders for communications between the United States and the Dominican Republic and Costa Rica. The Commission may now grant PAS final authority for communication to these points.

4. Accordingly, IT IS ORDERED that the conditions for final authorization imposed on PAS's conditional construction permit have been satisfied and PAS may proceed to operate:

1) five 4/6 GHz transponders on the PAS-1 satellite to provide communications capacity between the United States and the Dominican Republic and Costa Rica consistent with the INTELSAT consultations completed in April 1987 and in October 1988;[6] and

2) six 11/14 GHz transponders on the PAS-1 satellite to provide communications capacity between the United States and the United Kingdom, Ireland, the Federal Republic of Germany, Sweden and Luxembourg consistent with the INTELSAT consultation completed in April 1987 and October 1988.

5. IT IS FURTHER ORDERED that the operation of PAS's proposed system is restricted to the provision of capacity through the sale or long-term lease of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

6. IT IS FURTHER ORDERED that this authorization only applies to provision of communications capacity between the U.S. and the countries specified in paragraph 4 above. Any communications between the U.S. and other locations as well as the provision of capacity for domestic communications within Latin American countries will require additional consultation under Article XIV.

7. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on operation of the PAS network in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

8. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions stated above.

9. IT IS FURTHER ORDERED that prior to use of any other transponders on the satellite, or use of the satellite for communications to or from any points other than those specified in paragraph 4 or previously authorized, PAS shall obtain further authority from the Commission; and prior to use of the satellite for communications to or from any INTELSAT country other than those listed above, PAS shall receive verification from that country

that it has fulfilled its obligation under Article XIV(c) or (d) of the INTELSAT Agreement and PAS shall forward such verification to the Commission.

10. IT IS FURTHER ORDERED that, except as specified herein, the terms and conditions specified in PAS's construction authority still apply.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046, 1178 (1985).

[2] Pan American Satellite Corporation, 101 F.C.C. 2d 1318 (1985).

[3] Pan American Satellite Corporation, FCC 86-257 (released May 21, 1986).

[4] Pan American Satellite, 2 FCC Rcd 7011 (1987).

[5] Pan American Satellite, 3 FCC Rcd 677 (1988).

[6] *See* INTELSAT Assembly of Parties Record of the Eleventh (Extraordinary) Meeting, AP 11-3-E (April 1987); INTELSAT Assembly of Parties Record of the Thirteenth (Extraordinary) Meeting, AP 13-3-E (October 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CORPUS CHRISTI
COMMUNICATIONS, INC.
Complainant,

v. File No. E-88-79

SOUTHWESTERN BELL
TELEPHONE COMPANY
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: October 26, 1988; Released: November 7, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On July 15, 1988, Corpus Christi Communications, Inc. (CCC), a reseller of long distance service, filed a formal complaint with the Commission alleging that Southwestern Bell Telephone Company (SWBT) illegally threatened to disconnect CCC's PBX trunks unless CCC converted its lines to interstate access service.

2. CCC initially filed a civil action, pending in the U.S. District Court, Southern District of Texas. The District Court stayed the action based on an agreement by the parties to seek a resolution with the Commission.

3. On September 8, 1988, CCC moved to dismiss its complaint because it has sold all of its assets and is no longer in the telecommunications business. CCC states that it will pursue the action in District Court. SWBT responded that the Commission should resolve the complaint since it is likely the Court will refer the matter back to the Commission under the doctrine of primary jurisdiction. SWBT also contends that CCC is trying to avoid its agreement to pay back billing if SWBT should prevail at the Commission.

4. It appears that CCC will not pursue its case even if we decline to dismiss it and therefore, no useful purpose will be served thereby. Further, we conclude that insufficient evidence has been presented which would justify the Commission pursuing this matter on its own initiative.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Motion to Dismiss filed by the Complainant IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned complaint is DISMISSED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MILLER COMMUNICATIONS, INC. File No. 00720-CL-TC-1-88

For Consent to Transfer of Control of Green Bay CellTelCo, the licensee of Station KNKA525 in the Domestic Public Cellular Radio Telecommunications operating on Frequency Block A in the Green Bay, Wisconsin Metropolitan Statistical Area to McCaw Communications of Green Bay, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1988; Released: November 7, 1988

By the Chief, Mobile Services Division:

1. Brown County MSA Cellular Limited Partnership (BCLP) has filed a Petition to Dismiss or Deny (Petition) the captioned application to transfer control of Green Bay CellTelCo (Green Bay CTC) from Miller Communications, Inc. (Miller) to McCaw Communications of Green Bay (McCaw). Green Bay CTC and Miller jointly filed an opposition, and McCaw filed a separate opposition to the Petition. BCLP filed a consolidated reply to the oppositions.

BACKGROUND

2. BCLP is the wireline licensee and Green Bay CTC is the non-wireline licensee in Brown County, the only county in the Green Bay MSA. Miller is the majority owner of Green Bay CTC, which operates Station KNKA525.[1] On February 25, 1988, the application for Commission Consent to Transfer of Control of Green Bay CTC from Miller to McCaw was filed.[2]

CONTENTIONS OF THE PARTIES

3. In its Petition, BCLP incorporates its arguments set forth in BCLP's Petition to Reconsider Grant of Special Temporary Authority and Informal Request to Revoke License (*STA Petition)*, namely, that Miller, Green Bay CTC, and McCaw misled the Commission into believing that an emergency existed in the Green Bay MSA to obtain a special temporary authorization (STA) grant for improved facilities to provide cellular service to the Red Cross. [3] BCLP further contends that McCaw already has gained *de facto* control of Station KNKA525 from Miller without Commission approval. In support of its assertion, BCLP states that a McCaw help-wanted advertisement appearing in the July 12, 1987 edition of the *Green Bay Press - Gazette* indicates that McCaw, and not Miller or Green Bay CTC, seeks a cellular market manager for Green Bay, thus showing that McCaw makes personnel decisions for Green Bay CTC. In addition, BCLP states that McCaw controls Green Bay CTC's daily operations and policy because Mr. Miller is located in Pensacola, Florida and not in Green Bay, and it was McCaw, not Miller or Green Bay CTC, to whom the Red Cross wrote concerning the operations of Station KNKA525. Further, BCLP asserts that an article in a trade publication (the Feb./Mar. issue of *Cellular Equity Mismatch) (Equity)* indicates that McCaw has lent money to Green Bay CTC and has limited the transfer of the partnership interests of minority owners. This, then, according to BCLP, indicates that McCaw has financed the construction costs of Green Bay CTC. Moreover, BCLP argues that McCaw obtained an option to purchase Green Bay CTC at some point prior to both the transer-of-control application and the STA grant.

4. Additionally, BCLP contends that McCaw is not financially qualified to assume control of Station KNKA525. First, GBLP argues that an October 6, 1987 Provident National Bank (Provident) letter McCaw has submitted does not demonstrate its financial qualifications because it simply indicates Provident's "pleasure" at being the lead bank in a syndicate that would lend the required money. GBLP adds that notwithstanding the declaration of a McCaw Vice President contained in the application as to the nature of the financial arrangements, the Commission requires the applicant to provide statements from the lending institutions setting forth such arrangements. Second, BCLP argues that McCaw has not supplied the contracts by which McCaw will gain control. These contracts need to be reviewed by the Commission, BCLP states, to ensure that the transferee has established its financial ability to acquire and operate the station. Moreover, according to BCLP, examination of the transfer contracts would enable the Commission to determine when control passed from Miller to McCaw and would also allow an opportunity to ascertain whether McCaw misrepresented its control status to the lender or misrepresented its financial plan to the Commission.

5. Green Bay CTC, Miller, and McCaw oppose the Petition, initially arguing that the Petition must be dismissed because it is procedurally defective. They state that although Section 22.30 of the Commisssion's Rules requires that petitions to deny be supported by an affidavit of a person with personal knowledge of the allegations of facts raised therein, BCLP's Petition does not satisfy this requirement because it merely contains an unsworn certification by an employee of the general partner of BCLP. As to the Petition's allegations, Green Bay CTC, Miller, and McCaw emphasize that McCaw does not possess either *de jure* control or *de facto* control of Green Bay CTC. They argue that: (1) McCaw placed the ad anticipating the commencement of its own independent resale activities in the Green Bay MSA and that such personnel obtained via the ad eventually might become Green Bay CTC employees when this system became operational. Moreover, Green Bay CTC and Miller assert that Miller authorized McCaw to identify potential agents and management personnel in the market but clearly told McCaw in July 1987 that McCaw had no authority to hire such personnel; (2) Miller's residence is irrelevant because operations of Green Bay CTC's system are managed locally by Michael Grady (Grady), who is not a McCaw employee but who is supervised and paid by Danbury Cellular Telephone Com-

pany, Inc. (Danbury), an independent cellular construction and management concern, pursuant to an agreement between Danbury and Green Bay CTC; (3) the Red Cross letters were sent to Grady of Cellular One (a trade name under which both the Green Bay and Appleton, WI nonwireline systems are separately licensed to operate), and Grady manages both of these systems from a single office in Appleton. Thus, the Red Cross was writing to the person responsible to Green Bay CTC and Miller; (4) as for the *Equity* article, Green Bay CTC and Miller note that McCaw and Green Bay CTC have independently denounced the article and have demanded a retraction from the publication, and that *Equity* has acknowledged its error; and (5) McCaw's option to buy Green Bay CTC in no way shows *de facto* or *de jure* control because, as earlier indicated, Green Bay CTC previously contracted with Danbury, and that a McCaw affilitate (McCaw Cellular Funding, Inc.) had made an arm's-length loan to Green Bay CTC but that the loan agreement does not otherwise give any McCaw company control over Green Bay CTC.

6. As to BCLP's allegation that McCaw is not financially qualified to consummate the proposed acquision, McCaw asserts that its submission of the Provident letter and the declaration of a McCaw financial officer providing additional information satisfy the Commission's reasonable assurance standard. Moreover, McCaw claims that the Commission recently found McCaw financially qualified to consummate the acquisition in another non-wireline system based on the same documents at issue in the instant application. McCaw also asserts that for this reason, it is not necessary for McCaw to file additional documents to support its financial qualifications.

DISCUSSION

7. We initially conclude that BCLP's Petition should not be dismissed on the basis of being procedurally defective. BCLP has attached to its reply to the oppositions the affidavit lacking in its original Petition. For this reason, and because of the serious charges raised, we will not dismiss the Petition on procedural grounds but will consider its merits.

8. After reviewing the pleadings, we reject BCLP's Petition and find no evidence of misrepresentation by Miller, Green Bay CTC, and McCaw regarding the request for a STA grant in providing service to the Red Cross. BCLP's allegations set forth in its *STA Petition* were previously reviewed and rejected. *See Green Bay CellTelCo*, 3 FCC Rcd 4531 (Mob. Serv. Div. 1988) (*STA Order*). We likewise cannot conclude, based on the record, that McCaw already possesses *de facto* control of Station KNKA525. The Commission has stated previously that a Commisssion licensee must at all times have control of, and responsibility for its facility, and that the normal minimum indicia of such interest which the Commission will examine include the following:

1. Does the licensee have unfettered use of all facilities and equipment?

2. Who controls daily operations?

3. Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

4. Who is in charge of employment, supervision and dismissal of personnel?

5. Who is in charge of the payment of financing obligations, including expenses arising out of operating? and

6. Who receives monies and profits derived from the operation of the facilities?

See Intermountain Microwave, 24 Rad. Reg. (P&F) 983, 984 (1963); *Public Notice*, Rpt. No. CL-87-1, Mimeo No. 009, Released Oct. 2, 1986.

9. Based upon a review of the record before us, we conclude the following: (A) We accept the uncontested assertion of Green Bay CTC and Miller that as the licensee, Green Bay CTC has unfettered use of all facilities and equipment because all cellular RF equipment is owned and invoiced to either Green Bay CTC or Danbury; the licensee is the lessee of its sole cell site in De Pre, WI, and no other party controls or restricts use of such facilities. (B) In ascertaining who controls daily operations, we acknowledge Danbury's control as agent of Green Bay CTC's daily operations. Further, as we stated in our *STA Order* at n.9, we refuse to draw any negative inferences from the Red Cross letter being addressed to the Appleton, WI operator based on Green Bay CTC's unrebutted asssertions there that the Appleton and Green Bay systems were, *inter alia*, separately structured and owned although technically integrated within the same administrative headquarters. (C) We find no basis in the record to contradict statements by Green Bay CTC and Miller that all policy decisions are made exclusively by Miller and the Green Bay CTC Executive Committee;[4] and that Miller personally retained appropriate counsel and reviewed and verified all Commission and state applications without involvement or participation of McCaw (excepting of course the instant transfer-of-control application). (D) Mr. Miller has demonstrated that he himself has sought and retained the key personnel, including Danbury, and BCLP has not shown otherwise. (E) We find no evidence disputing statements in the record that Green Bay CTC is completely responsible for the payment of financial obligations. (F) We accept the uncontested assertion that because Green Bay CTC only began operations relatively recently, there has been no profit and very little revenue but nevertheless, all revenue will belong exclusively to Green Bay CTC and that no one else has a right or interest in it. (G) Our review of the financing obligations leads us to conclude that the loan made by the McCaw affiliate to Green Bay CTC does not result in the element of control over the licensee. BCLP has failed to show that such financing was anything other than a negotiated arms-length agreement, and we accept the assertions that the financing agreement is comparable to any such agreement between a start-up business and an institutional lender.

10. Based on the circumstances presented in this proceeding, any consultations by both Green Bay CTC and Miller with McCaw on various matters is a reasonable expectation, especially inasmuch as McCaw is the prospective transferee and in view of McCaw's already being a partner in Green Bay CTC. *See, e.g., Bloomington - Normal MSA Limited Partnership*, 2 FCC Rcd 5427 (Com. Car. Bur. 1987), wherein it was held that the requirements of the *Public Notice* do not prevent a minority partner from participating in system operation as long as such

participation does not rise to the level of control. Additionally, we refuse to draw any negative inference from McCaw's having an option to buy a controlling interest because it is not determinative of whether control has been transfered until the option is exercised. *See, e.g., Petroleum Communications, Inc.*, 1 FCC Rcd 511 (1986).

11. We find BCLP's allegations directed at McCaw's not being financially qualified to be meritless. In *Corpus Christi Cellular Telephone Co.*, 3 FCC Rcd 1889 (Mob. Serv. Div. 1988) (*Corpus Christi*), the Commission earlier found McCaw financially qualified to acquire the Corpus Christi non-wireline system based on the same documents at issue in the instant application (namely, the Provident bank letter and the declaration of a McCaw financial officer providing additional financial information). Although BCLP notes McCaw's reference to this case, it states that *Corpus Christi* cannot be used as precedent because BCLP does not have standing to seek reconsideration there and because it "has raised unique financial qualification arguments." (BCLP Reply at 9). We find no such "unique" arguments present. In the *Corpus Christi* case, we closely examined McCaw's financial qualifications, and we find no reason to duplicate such review here.

CONCLUSION

12. Based upon the foregoing, we conclude that BCLP has failed to establish: that Miller, Green Bay CTC, and McCaw misled the Commission regarding the STA request; that McCaw had gained *de facto* control of Station KNKA525 without prior Commission approval; and that McCaw is not financially qualified to assume control of Station KNKA525. Moreover, we find that grant of the subject transfer application would be consistent with the Commission's Rules and the public interest. Therefore, we will grant the requested transfer.

ORDERING PARAGRAPHS

13. Accordingly, IT IS ORDERED that the Petition to Dismiss or Deny filed by Brown County MSA Cellular Limited Partnership IS DENIED.

14. IT IS FURTHER ORDERED that the request filed by Miller Communications, Inc. for consent to transfer control of Green Bay CellTelCo to McCaw Communications of Green Bay, Inc. IS GRANTED.

15. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] J. McCarthy Miller (who is President of corporate Miller) owns 50 percent of the licensee. In Summer 1987, McCaw acquired the interests of a number of minority partners in Green Bay CTC so that it owns 26.73 percent of the partnership interests. Miller (the corporation) holds 58.42 percent of the partnership interests.

[2] *See* Public Notice, Rpt. No. CL-88-80, Mimeo No. 2057, released Mar. 11, 1988.

[3] *See* Green Bay CellTelCo, File No. 00667-CL-MP-88.

[4] Messrs. Miller, Larry Waldrop, and Lowell Ferguson (a minority partner unconnected with McCaw).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

AIRCALL NORTHWEST INC. File No. 24293-CD-P/L-3-85

For authority to construct and operate a two-way facility on frequency 152.75 MHz in the Public Land Mobile Service at Seaside, Oregon

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1988; Released: November 7, 1988

By the Chief, Common Carrier Bureau:

1. Aircall Northwest, Inc. (Aircall) has filed a "Petition for Reconsideration and Acceptance of Application" (petition) requesting that the Mobile Services Division (MSD) reconsider its action returning the captioned application for a construction permit for frequency 152.75 MHz at Sugar Loaf Mountain, Oregon and related control facilities.[1]

BACKGROUND

2. Aircall filed an application for new two-way facilities to operate on frequency 152.75 MHz at Seaside, Oregon. By letter dated December 16, 1985, the MSD notified Aircall that since Aircall had another application pending for an additional facility on frequency 152.15 MHz at Seaside, and since the proposed 152.75 MHz and the 152.15 MHZ base stations were engineered to serve the same area, a need showing to justify a two-channel grant was required. Since Aircall had not provided such a showing, the MSD returned the application as defective, but granted Aircall's request for the additional channel on frequency 152.15 MHz.

CONTENTIONS AND DISCUSSION

3. In its petition, Aircall claims that the two frequencies it applied for have incompatible uses; namely, frequency 152.75 MHz was part of a "dial-up telephone and paging system" along Highway 101 whereas the frequency 152.15 MHz request was for local manual telephone service. Moreover, Aircall claims that because frequency 152.15 MHz is already being used in Astoria, Oregon, in close proximity to Seaside, such usage renders it unavailable for use at Seaside as part of the dial-up telephone and paging system along the highway. Consequently, Aircall argues that both channels should have been granted without any further showings.

4. We reject Aircall's arguments. The MSD assigns frequencies based on loading standards, demand, and spectrum efficiency. *See* Section 22.16 of the Rules. Whether frequency 152.15 MHz is available for Aircall's intended use does not negate the requirement for an applicant to submit a need showing when the applicant seeks more than one channel to serve the same area. Need study requirements are based solely on service contour overlap and are not based on usages designated by an applicant. Aircall has submitted neither a sufficient need showing for frequency 152.15 MHz to justify two-channel grant nor any grounds to justify waiver of this requirement. *See* Section 22.16(b)(3) of the Commission's Rules.[2] Consequently, its application was properly denied and returned as defective. *See, e.g., Norman M. and Maury S. Schklar*, Mimeo No. 6336, released Aug. 13, 1985.

5. We therefore affirm the MSD action which denied Aircall's application for frequency 152.75 MHz.

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Aircall Northwest, Inc., in File No. 24293-CD-P/L-3-85, IS DENIED.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Letter from Michael Deuel Sullivan, Chief, MSD, to James A. Koerner, Counsel for Aircall (Dec. 16, 1985).

[2] Section 22.16(b)(3)(i) provides:

> Applicants shall submit data on the number of units expected to receive service. Units shall be considered only if the applicant has written held orders for them or if they are projected from a valid statistical survey. The units shall be broken down by two-way, tone-only paging, tone-voice paging and tone-optical readout paging.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-421

In re Applications of

Robert L. Purcell d/b/a BIG BAY BROADCASTING — File No. BPH-851028MI

CWA BROADCASTING, INC. — File No. BPH-851028MJ

Philip & Eleanor D'Adamo d/b/a D'ADAMO COMMUNICATIONS — File No. BPH-851028ML

EASTERN SHORE BROADCASTING, LIMITED PARTNERSHIP — File No. BPH-851028NG

For Construction Permit for
a new FM station on Channel 232A
in Cambridge, Maryland

Appearances

Thomas W. Fletcher on behalf of Robert L. Purcell d/b/a Big Bay Broadcasting; *Alfred C. Cordon* and *Dennis J. Kelly* on behalf of CWA Broadcasting, Inc.; *Donald E. Martin* on behalf of D'Adamo Communications; *Erwin Krasnow*, *Thomas J. Keller*, *William E. Kennard*, and *David A. Naiman* on behalf of Eastern Shore Broadcasting, Limited Partnership; and *Jerry M. Hermele* on behalf of the Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: October 21, 1988; Released: November 7, 1988

1. The four applications in the caption and two others, which have been dismissed, were designated for hearing, on September 17, 1987, to consider which mutually exclusive proposal for Channel 232A should be granted. *Hearing Designation Order*, 2 F.C.C. Rcd 5915 (1987). The following issues will be decided in this decision:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by D'Adamo would constitute a hazard to air navigation.

2. Whether D'Adamo Communications was (a) lacking in candor, or (b) misrepresented material facts to the Commission, and (c) violated Section 1.65 of the Commission's Rules when it amended its application to report a media interest and made a commitment to divest that interest, without disclosing the interest had been acquired nine months before the amendment was filed, and, if that is the case, whether D'Adamo Communications should be found unqualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. Examination of the written testimony was conducted on April 25 and 26, 1988. The record was closed on April 26, 1988, *Order*, FCC 88M-1285, released April 29, 1988. Proposed findings of fact and conclusions of law were filed by the applicants and the Mass Media Bureau on June 29, 1988 and replies were filed by the applicants on August 4, 1988.

FINDINGS OF FACT

Issue 1: Whether the tower height and location proposed by D'Adamo would constitute a hazard to air navigation

3. D'Adamo did not introduce evidence about the air hazard issue into the hearing record. Tr. 190. Three days before the written testimony was due, on April 8, 1988, D'Adamo petitioned for leave to amend to designate a new transmitter site. On May 16, 1988, D'Adamo filed a supplement to the April 8, 1988 petition, and, on May 23, 1988, a request for leave to file a further supplement and supplement were filed.

4. D'Adamo, on April 11, 1988, also notified the Commission that it would not present evidence on the comparative coverage issue. D'Adamo's petition for leave to amend and its notification about the coverage issue have resulted in motions to dismiss D'Adamo's application by Eastern and Big Bay, a motion to enlarge issues against D'Adamo, oppositions to the D'Adamo petition for leave to amend by Eastern and Big Bay, and comments by the Mass Media Bureau on the unsupplemented petition for leave to amend. Because these filings are related to the air hazard issue, they will be considered together in this section of the decision.

The Petition for Leave to Designate a New Antenna Site

5. On April 8, 1988, D'Adamo urged that it should be permitted to designate a new antenna site because its "[r]peated efforts" to obtain a no hazard determination from the FAA had been in vain. The new site, which is on the existing tower of WCEM, will not require FAA approval. It is also the same site as that proposed by Big Bay and Eastern. D'Adamo claims it had tried at "various times" since the release of the HDO on September 30, 1987, to learn the status of the FAA's study of its proposal and to encourage a no hazard determination. But none was issued. Counsel for D'Adamo stated that the FAA had advised him that the FAA "may soon issue an indication as to a lower height that it may be willing to negotiate . . " But, D'Adamo's pleading continues, "neither counsel nor D'Adamo has received this indication in writing." D'Adamo urged that, because the FAA had not acted, it would need to designate a new site in order to timely establish its qualifications. D'Adamo explained that it was acting about six months after the issue was designated. It

maintained that its diligence in pursuing FAA approval during the six month period presented an equitable reason for granting the amendment designating a new site. D'Adamo did concede that the amendment was voluntary but, it urged, that that should be excusable because the move would resolve a qualifying issue, would not be disruptive, and would not prejudice any applicant. The amendment does not present any direct statement from D'Adamo beyond the text of the petition.

6. Eastern opposes the petition because D'Adamo fails to document its claim that it had contacted the FAA at various times. Eastern argues that, since over two years had elapsed from the time the original request was filed by D'Adamo with the FAA, D'Adamo was obligated to provide an explanation of its pursuit of FAA approval and it should have foreseen problems since its site is only three miles from the Cambridge Municipal Airport. Eastern claims that it is not likely that the FAA failed to rule on D'Adamo's 1985 request. Eastern points out that the FAA immediately acknowledges receipt of a request and notifies the applicant of a possible hazard determination. Eastern also attaches a Freedom of Information Act Request it has made to the FAA to examine the records regarding D'Adamo's request for FAA approval of its site. That letter indicates that Eastern was told by the FAA that D'Adamo's tower proposal was acknowledged and that it was not approved because D'Adamo failed to respond to the FAA's request for further information. Big Bay also opposes granting D'Adamo's petition because D'Adamo did not exercise due diligence when it sat by for six months without pursuing its proposal.

7. The Mass Media Bureau finds D'Adamo's new engineering showing to be accurate and it accepts the facts and reason which D'Adamo provides for claiming good cause. It urges granting the amendment.

8. Because these filings arrived a few weeks before the hearing, an attempt was made on April 25, 1988, at the hearing, to clarify whether D'Adamo had ever heard from the FAA about its site. D'Adamo's counsel said that neither he nor Mr. D'Adamo had ever heard from the FAA. Tr. 188. Counsel worded his answer so carefully that the presiding officer concluded that maybe he should have asked whether Edward Perry, who prepared D'Adamo's engineering, had been notified by the FAA. Counsel then conceded that the FAA had notified Mr. Perry and, when D'Adamo was asked to produce the FAA's notification, counsel said Mr. Perry would have to send it to him. Tr. 493. Counsel represented that when he wrote the petition for leave to amend, he did not know that Mr. Perry had heard from the FAA. Tr. 188. D'Adamo left the clear impression that Mr. Perry was then overseeing the engineering. These remarks were made by counsel but Mr. D'Adamo was present and, in testifying, he did not disagree with counsel or volunteer any other information.

9. Eastern filed a petition to enlarge on May 3, 1988; at that time, D'Adamo had provided no additional information about what it did to pursue its site proposal. Eastern urges in its petition to enlarge that D'Adamo misrepresented its efforts to obtain FAA approval. Eastern supports its allegations with materials it received from the FAA about D'Adamo's request for FAA approval of its tower. Those records show that the FAA notified D'Adamo on April 10, 1986 and advised it that its proposal exceeded the obstruction standards and its tower would have to be reduced to 220 feet. D'Adamo was informed that it had 30 days to request further study by the FAA. FAA records show that D'Adamo made no request and the FAA ended its inquiry on September 19, 1986. D'Adamo originally filed its request on October 24, 1985.

10. D'Adamo in its response to Eastern's allegations claims that it never said it had not heard from the FAA; D'Adamo urges that a careful reading of its petition for leave to amend would show only that it claimed to have never received a no hazard finding by the FAA. D'Adamo states that until April 28, 1988, it had received no FAA determination. D'Adamo urges, moreover, that that determination "does not relate" to its "original proposal." In addition, D'Adamo states that it did not "knowingly" fail to pursue its FAA application. Finally, D'Adamo argues that the statements made in the petition for leave to amend were not made by D'Adamo and its principals but were instead "arguments" made by its counsel. D'Adamo asserts that the facts represented there cannot be attributed "to the principals of D'Adamo because they did not write or execute the petition." D'Adamo argues that the most that could be said about its representations in the petition for leave to amend is that they might be the result of "legal and/or procedural errors made by counsel." "Legal writings" are not grounds for misrepresentation, D'Adamo urges.

11. Three days later, May 16, 1988, D'Adamo submitted, as a supplement to its April 8, 1988 petition for leave to amend, FAA approval of its original site at 220 feet. D'Adamo also claims that Edward Perry, D'Adamo's engineer, prepared a request to the FAA for further study of its original site proposal in 1986. According to D'Adamo, Mr. Perry, however, cannot find the request and the FAA has no record of having received it. D'Adamo did not submit a declaration from Mr. Perry to corroborate the claims made.

12. D'Adamo represents that, when, in January 1988, its counsel called the FAA, he was told the request had been terminated, and a new request could be made. According to D'Adamo, on January 29, 1988, it changed its tower proposal to 220 feet and filed a new request. (The Commission was not notified of the change.) D'Adamo represents that in mid-March its counsel asked the FAA about the request and the FAA said it had not received it. D'Adamo states that it then sent a new request to the FAA on March 15, 1988. On April 4, 1988, D'Adamo received an acknowledgement from the FAA that its request for FAA approval had been received. (D'Adamo implies that the FAA received the January 29, 1988 request and did not acknowledge it until April. The documents which are attached to the May 16, 1988 supplement appear, however, to indicate that, on March 15, 1988, D'Adamo sent the FAA a tower proposal which was dated January 29, 1988.) Despite receiving FAA approval for its original site, D'Adamo continues to urge that granting its amendment to designate a new site would be less disruptive.

13. On May 23, 1988, D'Adamo filed another supplement to its April 8, 1988 petition for leave to amend. For the first time it submitted declarations from Philip D'Adamo and Edward Perry. Mr. D'Adamo states he knew nothing about the FAA notice since the FAA did not personally notify him. Mr. Perry claims he did prepare a request for further FAA study in 1986 and he attaches to his statement the FAA acknowledgement which has typed at the top: "Please conduct a study to see if the proposed tower height will be permitted. Ed Perry."

14. Eastern opposes the further D'Adamo supplement. It points out that Mr. D'Adamo concedes he knew in January 1988 that the FAA had acknowledged that D'Adamo's site proposal was unacceptable and that that ruling by the FAA should have been reported.

15. These facts lead to the conclusion that D'Adamo did not act with due diligence to gain FAA approval of its site. From October 25, 1985 to January or March 1988, there is no reliable evidence D'Adamo did anything about pursuing its site proposal before the FAA. From September 1986, when the FAA ended its inquiry, to March 15, 1988, it had no proposal for a tower before the FAA. D'Adamo was notified by the FAA in April 1986 that its tower proposal was unacceptable and it concedes in its May 23, 1988 supplement that the FAA notice was received by its engineer. D'Adamo would move to a new site even though its original site has been approved at 220 feet because the new one is the same location proposed by two other applicants in the proceeding and, therefore, it claims that it would not be disruptive to the proceeding. D'Adamo has not established that 220 feet is insufficient to achieve coverage of the Cambridge area. The exhibits in this case were due on April 11, 1988; D'Adamo waited until Friday, April 8, 1988, to notify the Commission that on Monday, April 11, 1988, it would no longer pursue the site it had designated in 1985.

16. The equitable reason asserted by D'Adamo for granting the amendment is unsupported and appears unreliable. On April 8, 1988, D'Adamo represented that it had made "repeated efforts" to obtain a no hazard determination. It was not until D'Adamo was questioned at the hearing and Eastern produced FAA records in its petition to enlarge that D'Adamo came forward and conceded that from 1985 to January or March 1988 it did nothing. That resulted even though the Commission reminded D'Adamo in September 1987 that it did not have FAA approval of its site. D'Adamo failed to inform the Commission until confronted with Eastern's documents that it made no proposal to the FAA until March 15, 1988, less than a month before the exhibits were due on April 11. D'Adamo stated that at "various times" following designation of the air hazard issue, it tried to learn of the status of the request. That is not an accurate representation of its actions. By D'Adamo's own account, there appears to have been one call in January 1988 and two in March 1988.

17. But more significantly, even after counsel and D'Adamo conceded they knew D'Adamo had no pending tower proposal in January 1988, no new proposal was made until mid-March 1988. It is possible that D'Adamo sent a new request on January 29, 1988, but, if it did, it did nothing for a month and a half to see whether the proposal was acceptable. In addition, D'Adamo failed to notify the Commission that it no longer was pursuing its original FAA proposal and that it had made a new one. Moreover, it appears that, when D'Adamo made a good cause showing on April 8, 1988, it failed to explain that the pending FAA proposal was not the same as its original one and it appears that it withheld material facts about its diligence in pursuing its original and second proposals with the FAA. The FAA is in no respect at blame. It told D'Adamo in April 1986 that its proposal needed to be revised, it waited for D'Adamo to respond until September 1986, and when D'Adamo did not reply, it terminated its inquiry. After D'Adamo sent the FAA an acceptable proposal, the FAA gave its approval in less than 45 days. These facts came to light not from D'Adamo but from Eastern, another applicant in this proceeding. The information submitted by Eastern raises a serious issue about whether D'Adamo's claims about its tower proposal were untruthful.

18. D'Adamo had ample time following the FAA notification in April 1986 and the Commission designation of the air hazard issue in September 1987 to resolve the problem before the hearing. Instead, D'Adamo did nothing to pursue its proposal during the time provided and, moreover, it withheld the facts about its inaction. To examine its conduct about the air hazard issue would require an additional hearing. For these reasons the petition for leave to amend will be denied. D'Adamo urges that its actions regarding the air hazard issue are not disruptive. But in practical effect they have been and would continue to be if the amendment were granted since additional hearing sessions would be required to determine whether it exhibited bad character in pursuing the air hazard issue before the Commission.

D'Adamo's failure to introduce signal coverage evidence

19. The HDO directs that the areas and populations which would receive FM service of mV/m or greater intensity, together with the availability of other primary aural services in such areas, are to be considered under the standard comparative issue. The engineering proposal for the showing was to have been filed on March 28, 1988 with the Bureau. D'Adamo made no showing and stated that it did not join in the other applicants' exhibit. Tr. 12-13. Eastern has moved to dismiss D'Adamo's application for failing to introduce evidence on the designated issues. D'Adamo responds to Eastern's petition by maintaining that its failure to introduce evidence is "litigation strategy"; D'Adamo states that it "determined that its case would not necessarily be furthered by presenting direct testimony on that issue."

20. The "strategy" employed by D'Adamo is one the Commission has long held to be contrary to the public interest. In *Babcom, Inc.*, 31 F.C.C. 2d 425, 427 (1971), an applicant argued that because the comparative coverage was not "decisive", the failure to make a showing was irrelevant. The Commission held that "[o]nce such a[n] issue has been specified, the duty to meet it cannot be negated by claiming that it is irrelevant. . . . It is the principal source of data in making the 307(b) comparison of the applications." *Id.* The Commission also observed that it was at a loss to understand how the applicant could propose to serve the needs and interests of the population within its service area if it had no realistic idea of what that population or area was. *Id.* The Commission explained that whether the applicant should be dismissed for not making a showing depended on the circumstances under which the applicant failed to meet its burden. D'Adamo did not make its showing because it believed it was good strategy not to, in light of its failure to resolve the air hazard issue. While D'Adamo does not discuss it, it appears the real reason it did not provide engineering on March 28 or at the hearing was because it was in the process of trying to decide where its antenna would be located. Its motivation, in other words, was its personal convenience. D'Adamo has not shown any equitable reason why its application should not be dismissed for not making the required comparative showing. If D'Adamo

had been found qualified under the air hazard issue, the Eastern motion to dismiss would have resulted in D'Adamo's application being dismissed.

Issue 2: Whether D' Adamo lacked candor or misrepresented material facts and violated section 1.65 when, in making a divestiture pledge, it failed to report the date on which it acquired a local newspaper.

21. This issue arose when D'Adamo reported on October 21, 1987 that Philip D'Adamo through his 100% owned D'Adamo Communications, Inc. acquired a local weekly newspaper, the *News & Farmer* in Preston, Maryland. D'Adamo stated that Philip and Eleanor D'Adamo held all corporate offices in D'Adamo Communications, Inc. and that they would divest the newspaper if they received a grant. D'Adamo concedes that it acquired the newspaper in February 1987. D'Adamo Exh 4, at 2; Tr. 392. The *News & Farmer* circulates in Cambridge, which is 13 miles from Preston, Maryland where the paper is published. D'Adamo Exh. 8, at 1; Tr. 292. Mr. D'Adamo decided to divest the paper on October 21, 1987 when D'Adamo filed its petition for leave to amend to inform the Commission about the acquisition. Tr. 319. When D'Adamo reported ownership of the paper and made its promise to divest, it did not report when the paper had been acquired. D'Adamo Exh. 4, at 4.

22. Mr. D'Adamo states that he did not discuss with anyone at any time until the fall of 1987 whether he should have reported that he owned the *News & Farmer*. D'Adamo Exh. 4, at 2. He also did not discuss whether the newspaper would affect his application until the fall of 1987. *Id.* Mr. D'Adamo said he did not know that the newspaper would be of "any consequence" in this proceeding until counsel told him it would be in October 1987. D'Adamo Exh. 4, at 4-5. It was then that Mr. D'Adamo also learned that the acquisition of the paper should have been reported within 30 days. *Id.*

23. But when Mr. D'Adamo was examined on his written testimony, he said that he knew when he filed his application that media interests would result in a diversification demerit. Tr. 282-83. In conflict with his written testimony, he also stated that he spoke with his counsel in the fall of 1987 about the paper because he knew newspapers were media interests. Tr. 294. Mr. D'Adamo represents that he did not include in the October 21, 1987 amendment the date he acquired the paper because he did not consider that fact to be a material omission. D'Adamo Exh. 4, at 4. He also maintains that he relied on his counsel to provide the necessary and appropriate information. *Id.*, at 5. But it is apparent that Mr. D'Adamo was not relying just on his counsel; he maintains that until this hearing arose he looked after his own proposal with the help of only an engineer. He helped prepare an extensive analysis of his media holdings which included another divestiture pledge of a contingent interest in a station he had financed. D'Adamo Exh. 4, at 1-2. It appears he followed that course because he has extensive broadcast management and ownership experience. D'Adamo Exh. 2, at 3-4; D'Adamo Exh. 9, at Exh. 1; Tr. 193, 287.

24. The *News & Farmer* has a circulation of 900 in Dorchester County and 747 in Talbot County, the two primary counties to be served by D'Adamo. D'Adamo Exh. 8; Tr. 329. Within D'Adamo's 1 mV/m contour there are, in addition, radio stations WCEM AM and FM in Cambridge and the *Cambridge Banner*, a daily newspaper. Tr. 329-30.

Issue 3: Comparison of the applicants

Diversification of Ownership of the Mass Media

25. Big Bay, a sole proprietorship operated by Robert L. Purcell, has no media interests. Big Bay Exh. 2. Neither CWA nor its 100% owner, Charles W. Adams, Jr., own mass media interests. CWA Exh. 1, at 1; CWA Exh. 2, at 1. Mr. Adams works for and is an officer of Annapolis Broadcasting Corporation, licensee of WANN(AM), Annapolis, Maryland. CWA Exh. 2, at 1. But he has promised to resign from that association if his application is granted. *Id.*

26. D'Adamo, which is apparently a partnership between Eleanor and Philip D'Adamo, does not own any media interests. Philip D'Adamo owns, through D'Adamo Communications, Inc. the weekly newspaper, the *News & Farmer*. D'Adamo Exh. 8. The paper has a paid circulation of 5400 and averages 8 pages per issue. *Id.* Nine hundred subscribers are in Dorchester County, where Cambridge is located. *Id.* D'Adamo did not give circulation figures for Cambridge but Mr. D'Adamo testified that there are subscribers in Cambridge. Tr. 292. Cambridge has a daily newspaper, the *Cambridge Banner*, whose circulation is 7,662 and broadcast facilities WCEM-AM and FM. Tr. 329-30; D'Adamo Exh. 8, at 1.

27. Eastern Shore is a limited partnership with one general partner, G. Godwin Oyewole, and two limited partners, Harry M. Shooshan, III and Charles L. Jackson. Eastern Shore Exh. 1, at 1; Tr. 453. The general partner and the partnership have no media interests. Eastern Shore Exh. 1, at 1. The limited partners, Shooshan and Jackson, own 47.5% of MMDS applicant Multichannel Video Corporation, which is the tentative selectee for Manchester, Iowa and Abingdon and Springfield, Illinois. *Id.* The construction permits have not issued. *Id.*

Integration of Ownership and Management

28. Robert Purcell, the sole proprietor of Big Bay, proposes to work full time, 40 hours per week, as general manager of the station. Big Bay Exh. 3, at 2. He will supervise and direct station operations, make policy decisions, and hire and fire employees. *Id.* Mr. Purcell proposes to move to Cambridge from Rockville, Maryland, where he now works and lives. Big Bay Exh. 3, at 2; Tr. 20. Mr. Purcell works in Rockville as a consulting broadcast engineer; he plans to either sell the business or reduce the time he spends to 10-15 hours per week. Big Bay Exh. 3, at 2. Previously, when Mr. Purcell owned interests in broadcast stations in New Castle, Pennsylvania, Fairmont, West Virginia, Freeland, Pennsylvania, and Pocomoke City, Maryland, he did not participate in the day-to-day management. Big Bay Exh. 3, at 2; Tr. 29, 34. Mr. Purcell has no day-to-day-experience in operating a broadcast station. Tr. 33.

29. CWA is a corporation with one shareholder, Charles W. Adams, Jr. CWA Exh. 1, at 1. Mr. Adams holds all offices in CWA and he proposes to work as the general manager on a full-time basis, 40 hours per week. CWA Exh. 2, at 1. Mr. Adams will supervise construction, and operation of the station. *Id.* Mr. Adams would move to a location within the proposed 1 mV/m contour, in the Cambridge area. CWA Exh. 2, at 1-2. Mr. Adams is black and has been employed as a radio broadcast announcer and personality at WANN, Annapolis, Maryland since 1952. CWA Exh. 2, at 4-5.

30. Mr. Adams claims to have participated in civic activities within the proposed service area. Between 1952 and 1980, he served as a master of ceremonies at the Cambridge Elks Lodge for socials and other events for about 20 hours per year. He was paid only gas money. CWA Exh. 2, at 4. Mr. Adams, from 1966 to 1978, had a similar arrangement with an Elks group in Easton, Maryland. *Id.*

31. D'Adamo represents that it is a general partnership which is owned equally by Philip and Eleanor D'Adamo. D'Adamo Exh. 1, at 1. When D'Adamo filed its application it represented that the applicant was a sole proprietorship. D'Adamo Exh. 6, at 1. The application was, however, signed by both D'Adamos. *Id.* When the application was filed, the D'Adamos had no written partnership agreement; they did have an oral agreement to share equally in the proposal, with each one owning one-half. D'Adamo Exh. 1, at 1. A written agreement was made on October 16, 1987. D'Adamo Exh. 1, at Attach.

32. Mr. D'Adamo proposes to work full time, 40 hours per week, as the general manager. D'Adamo Exh. 2, at 1. He will supervise all department heads and develop and implement all policies. *Id.* Ms. D'Adamo proposes to become the program director on a full-time, 40 hour per week, basis. D'Adamo Exh. 3, at 1. She will hire and supervise all programming personnel, oversee and develop programming policies, and determine the station's program schedule. *Id.* Mr. D'Adamo will, however, have supervisory authority over Ms. D'Adamo. Tr. 298. Ms. D'Adamo has not separately contributed money to the applicant or provided assistance in development of the proposal. Tr. 371, 373. 361-62, 368-70. Ms. D'Adamo believes Mr. D'Adamo will have the final say. Tr. 381. Ms. D'Adamo did not prepare the programming exhibit that was submitted with the application. Tr. 384. At the hearing she could not recall having made any decisions about the application. Tr. 361. Ms. D'Adamo did not give consistent testimony about when she decided to become programming director. *Compare* Tr. 356-58 and 363.

33. The D'Adamos are married and, since 1952, have lived in East New Market, Maryland, which is within the proposed 1 mV/m contour. D'Adamo Exh. 2, at 1; D'Adamo Exh. 3 at 1. Mr. D'Adamo has been a county commissioner for Dorchester County from 1970 to 1978 and from 1982 to 1986; a member of County Social Services Board from 1970 to 1978 and from 1982 to 1986; a member of the County Planning and Zoning Board from 1970 to 1978; a member of the board of the Dorchester County Family YMCA from 1984 to 1986 and from 1987 to the present; and he has been involved in many other local activities. D'Adamo Exh. 2, at 1-3. Ms. D'Adamo has belonged to a homemakers club since 1964, the American Legion Auxiliary since 1957, and a local church since 1972. D'Adamo Exh. 3, at 2. Mr. D'Adamo has worked at broadcast stations in management and staff positions from 1964 to 1984. D'Adamo Exh. 2, at 3-4. He has also held ownership interests in broadcast stations. Ms. D'Adamo is female.

34. Eastern is a limited partnership with one general partner, G. Godwin Oyewole, and two limited partners, Harry M. Shooshan III and Charles L. Jackson. Eastern Exh. 1, at 1. Each partner owns 33 1/3% of the partnership's equity. *Id.* Mr. Oyewole proposes to work 40 hours per week as general manager; he will have full responsibility for operation of the station. Eastern Exh. 2, at 1. Mr. Oyewole will move to Cambridge. *Id.* He is black. *Id.* Mr. Oyewole was the general manager of WDCU-FM from 1981 to 1986. Eastern Exh. 2, at 2. From 1972 to 1977, he was general manager of WFRC-FM. *Id.* He also worked at WHPK-FM from 1967 to 1970 and at the Eastern Public Radio Network from 1972-75. *Id*, at 1.

35. Eastern's proposed general manager and only general partner, Godwin Oyewole, was told about the Cambridge channel from Harry Shooshan, a limited partner. Mr. Shooshan is a broadcast consultant, lawyer, and had been a law school teacher of Mr. Oyewole. It was in September 1985 that Mr. Shooshan first approached his former student about filing for the frequency. Tr. 419-22. Mr. Oyewole, after visiting Cambridge, told Mr. Shooshan that he would join him in an application. Tr. 427. Charles L. Jackson, who is also communications consultant and an associate of Mr. Shooshan's, joined with Messrs. Oyewole and Shooshan. Mr. Oyewole also knew who Mr. Jackson was because he lectured in Mr. Shooshan's class at Mr. Oyewole's law school. Tr. 424. Mr. Oyewole did not know him personally but he knew that Mr. Jackson and Mr. Shooshan were in business together. Tr. 421, 429. Their intention from the outset, according to Mr. Oyewole, was to do the work of preparing the proposal themselves in order to spend as little as possible. Tr. 428.

36. They met together in October 1985 and each of the three determined to use their expertise to forward the proposal. Tr. 425, 433. Mr. Oyewole said he believed the arrangement a good one because Mr. Jackson and Mr. Shooshan were knowledgeable about broadcasting. Tr. 446. They formed a corporation and each one of them held an office, became a director, and were to own one third of the stock. Mr. Shooshan prepared the corporate documents. Tr. 441, 442. But they did not issue stock certificates and the owners did not sign subscription agreements. Tr. 442. Mr. Jackson, an engineer, prepared the engineering and, after review by an outsider, it was filed with the application. Tr. 434, 435, 436. All three owners reviewed the application. Tr. 444. Mr. Oyewole obtained the transmitter site and arranged for a location for the public file. Tr. 413, 458-59. Afterward, they retained communications counsel who suggested they organize as a limited partnership, with Mr. Oyewole, who intended to operate the station on a day-to-day basis, as the general partner and Messrs. Jackson and Shooshan as limited partners. Tr. 451.

37. They retained their same equity interests under the new legal form. Tr. 452, 453. Mr. Oyewole also was familiar with Eastern's outside counsel because he too had taught at his law school. They all agreed to reorganize as a limited partnership. Tr. 475-76, 478-79, 480. The application was filed on October 28, 1985, six days after the limited partnership was formed. Tr. 470-71. Limited partners may not, under Eastern's agreement, serve as employees, communicate with the general partner about media-related business, remove the general partner and perform services for the partnership. Eastern Exh. 1, at 2. Since organizing as a limited partnership, Mr. Oyewole has managed all business of the partnership involving the application. Tr. 413-14, 460-61, 462, 463. The partners have met to discuss the application when it has been necessary. They met when the application was returned, when it was reinstated, and just before the hearing filing fee was due. Tr. 480-81, 487. Mr. Jackson suggested that he prepare a model to determine their chances for success in the proceeding.

Comparative Coverage

38. D'Adamo did not submit evidence on the comparative coverage issue and the effect of that has been considered at ¶¶ 19- 20. In addition, a dispute has arisen about whether CWA should be considered as having joined in the joint exhibit filed by Big Bay and Eastern on April ll, 1988, the day when written direct testimony was due. The joint engineering exhibit was prepared by Big Bay's only principal, Robert Purcell. Mr. Purcell, although he is a sometime broadcast owner, earns his living as an engineering consultant. He prepared the joint exhibit which was submitted to the Mass Media Bureau on March 28, 1988, before exchanging exhibits for introduction into the record of this proceeding.

39. Big Bay (Mr. Purcell) moves to dismiss CWA's application because, in Big Bay's view, CWA did not timely pay for the joint engineering and, therefore, it could not be considered as an applicant that joined in the joint engineering exhibit. CWA filed no separate engineering. Big Bay alleges in a declaration of counsel, Thomas W. Fletcher, that, from December 9, 1987 until March 24, 1988, CWA did not make plans to develop coverage information which was due to be filed with the Bureau on March 28, 1988 and exchanged on April 11, 1988. Robert Purcell was in the process of preparing a coverage exhibit on March 24 when CWA contacted his counsel. According to the Fletcher declaration, he informed CWA that its share of the Purcell exhibit would be900-1,000. CWA, Fletcher states, wanted time to think it over and he gave CWA "a couple of hours". He claims CWA did not respond within the time limit. On March 25, 1988, the next day, Fletcher wrote to CWA and said that since he had not heard from it, CWA could not be part of the exhibit prepared by Purcell.

40. CWA's counsel maintains that when he spoke with Big Bay's counsel, on March 24, 1988, he was told that CWA would join in the exhibit assuming, Charles Adams, CWA's only principal, agreed. Counsel for CWA states that, late in the day on March 24, 1988, Fletcher demanded payment by the next morning, March 25, 1988. CWA represents that Mr. Adams agreed the next morning to join in the exhibit but when CWA's counsel was unable to reach Fletcher, he left a message at his office which conveyed Adam's consent and said that Mr. Adams would pay by April 5, 1988 and that his counsel would guarantee payment. CWA states that it then received a letter from Big Bay, late in the day on March 25, which said that the deal was off because payment had not been received and apparently because CWA had not responded the day before. There are some minor disputes about the facts but overall those just recited appear to represent the outline of what happened. On April 5, 1988, CWA sent Big Bay a check for its share of the engineering coverage exhibit. The same day Big Bay returned the check.

41. This dispute demonstrates, Big Bay argues, that CWA did not prosecute its application. The facts alleged do not support that claim. It appears that no engineering had been finally prepared when Big Bay sought CWA's participation. Although the exhibit was due four days later with the Bureau, it was not due to be exchanged until two weeks later. Ordinarily, a consulting engineer is free to set payment terms in any manner he or she believes acceptable. But in this case the consultant had everything to gain by setting terms which could not be met since he was also an applicant. When an engineer who is preparing a joint exhibit also has a stake in the outcome, as CWA points out, the Commission is free to review the terms under which applicants were excluded to determine whether the consultant acted fairly and whether it could be concluded that nonpayment exhibits an unwillingness to prosecute. A demand for payment in less than 24 hours does not appear fair and CWA's response in less than a day that it would participate, which was two weeks before the exchange date, appears reasonable. It cannot be concluded that CWA was either unwilling to prosecute or that it would not pay its share. For these reasons, the petition to dismiss will be denied and CWA's coverage proposal will be compared.

42. The following data are based on the applicants' joint engineering exhibit, which was prepared in March 1988, and received into evidence on April 25, 1988. The applicants propose to serve the following total areas and populations:

Applicant	Area (Square Miles)	Population
Big Bay	602	44,152
CWA	607	49,793
Eastern Shore	440	33,879

None of the applicants proposes any white or gray area coverage. *i.e.*, service to an area not presently receiving any aural services, or service to areas receiving only one aural service, respectively. As illustrated below, the applicants propose service to underserved areas (areas now receiving two, three or four aural services):

	Applicant	Area (SquareMiles)	Population
3rd service (night)	Big Bay	11	71
	CWA	0	0
	Eastern Shore	0	0
4th service (night)	Big Bay	49	265
	CWA	0	0
	Eastern Shore	17	125
5th service (night)	Big Bay	39	5,487
	CWA	7	5,529
	Eastern Shore	14	346

Auxiliary Power

43. All of the applicants propose auxiliary power. Big Bay Exh. 4; CWA Exh. 3; Tr. 80; D'Adamo Exh. 7; Eastern Exh. 3.

CONCLUSIONS

The air hazard issue against D'Adamo

44. D'Adamo did not introduce evidence on the air hazard issue. Instead, it petitioned to move its site to a location designated by other applicants; that request was made on April 8, 1988, the Friday before the Monday when exhibits were due on the air hazard issue. D'Adamo represents that it has been diligent in obtaining FAA approval for its original site but that the FAA refused to indicate whether the location and height proposed by D'Adamo would pose a hazard to air navigation. D'Adamo's showing in support of that claim, however, does not demonstrate good cause for changing antenna sites and in its filings, it has raised an additional question

about the truthfulness and reliability of its representations to the Commission in resolving this issue. A full consideration of D'Adamo's arguments has been provided in ¶¶ 2-18.

45. After the close of the hearing record, the FAA approved D'Adamo's initial site at the height it sought in March 1988, but despite the FAA's approval, D'Adamo continues to request that it be allowed to move to its new site for which it has not established good cause. In any event, even if D'Adamo continued to propose its original tower site, there would be no justification for reopening the record because D'Adamo's own inaction resulted in its failure to make a timely showing before the close of the record. Moreover, even if the record were reopened D'Adamo's filings about its actions in seeking FAA approval raise issues about its truthfulness and reliability. There is no question that, if D'Adamo had diligently pursued its tower proposal, the FAA's action would have been taken long before the due date for testimony on April 11, 1988. That is apparent because once D'Adamo made a proper FAA filing, the FAA acted within 45 days.

Other qualifying issues raised about D'Adamo's proposal
D'Adamo's failure to introduce coverage evidence

46. Aside from failing to diligently establish that it proposed an antenna site that would not be a hazard to air navigation, D'Adamo, as a matter of "strategy", refused to introduce population and signal coverage data about its proposal. That failure, under the circumstances, represents an avoidance of the Commission's processes by D'Adamo and exhibits an unwillingness to permit the Commission to fully examine the comparative public interest benefits or detriments of granting a license to D'Adamo. On that ground too, D'Adamo is unqualified for comparative consideration.

D'Adamo's representations about the acquisition of a daily newspaper were untruthful

47. In October 1987, D'Adamo reported to the Commission that its principal, Philip D'Adamo, had recently acquired a local weekly newspaper. D'Adamo promised to divest the paper if it received a grant. Philip D'Adamo, who is one of two partners in D'Adamo, signed the amendment. But the amendment did not actually represent the reporting of a recent transaction; the purchase had not taken place and been reported within 30 days as §1.65 requires. Characterizing the acquisition as having been recent and failing to identify that the purchase had been nine months previous appears to have been a deliberate act. D'Adamo's pledge to divest was too late to preserve its comparative standing and, if the facts withheld had been revealed, there would have been no basis for the claim. A timely divestiture pledge was required within 30 days of purchase. Mr. D'Adamo claims that he relied on counsel to provide the relevant facts. But Mr. D'Adamo concedes he knew about the importance that a local media interest would have on his proposal and he knew which facts were relevant. He claims that before he hired a lawyer that he and his engineer, as part of D'Adamo's application, wrote an exhibit which made a promise to divest an interest in a station he financed, if through default he acquired ownership of the station. The record is silent on why Mr. D'Adamo waited until October 1988 to report his newspaper, but his reason for not reporting the full details is apparent.

48. The record does not support D'Adamo's claim that the withholding of the date on which the newspaper was purchased was an error for which it cannot be held responsible. D'Adamo is represented by experienced counsel, Philip D'Adamo is an experienced broadcaster and broadcast applicant and he was aware of the need to report media interests and to promise to divest on time if they were not to be counted in assessing his diversification standing. Section 1.65 is explicit and clear about when to report material changes. Overall, D'Adamo's untimely reporting and withholding of information continued. D'Adamo, when it requested leave to amend its tower proposal, six months after the requirements of §1.65 had been specifically explained in an order designating this issue, again withheld material information and mischaracterized the facts asserted to establish good cause. The facts surrounding that amendment demonstrate that when there were significant differences in its tower proposal which related to an existing issue, D'Adamo did nothing to apprise the Commission of those changes. With regard to its antenna site, D'Adamo failed to timely pursue its proposal and then it appears to have misrepresented the actions that it took. From these incidents, it must be concluded that D'Adamo would make an unreliable licensee. D'Adamo is not entitled to comparative consideration because it is not a qualified applicant.

Comparative consideration of Big Bay, CWA, and Eastern
Diversification of ownership of the mass media

49. Big Bay, CWA and Eastern are equal on diversity of control of the media of mass communications; none of these applicants or their principals currently have any media interests.

Integration of ownership and management

50. Both Big Bay and CWA have one principal, respectively, Robert Purcell and Charles W. Adams, Jr., who intends to manage the station on a full-time, 40 hours per week, basis. Eastern's only general partner, Godwyn Oyewole, would do the same but a question exists as to whether he has full control as a limited partner. While Eastern now has a partnership agreement which appears to exclude limited partners from control in the manner required by the Commission, the hearing evidence indicates that the partners operated as group until communications counsel suggested they reorganize as a limited partnership to preserve their comparative position. *See Instructions for FCC 301*, Services Volume Rad. Reg. (P&F) 98:301-1, at 98:301-1-2 (1987).

51. Before the reorganization, the partners, which include Mr. Oyewole, Harry Shooshan, and Charles Jackson, acted jointly and in consultation. Mr. Jackson, who is a communications engineer, prepared the engineering, Mr. Shooshan, who is a communications lawyer and consultant, prepared the legal documents, and Mr. Oyewole undertook finding an antenna site and, ultimately, additional legal help. But even after the group was reorganized to exclude Messrs. Jackson and Shooshan from control, they all reviewed problems that arose about the application and met to discuss important aspects of pursuing their proposal. There is no question that Mr. Oyewole would manage the station on a day-to-day basis but from their actions thus far it must be concluded that Messrs. Jackson and Shooshan would not be excluded from the decisions to be made about establishing and operating the station.

52. While there is now a partnership agreement that on its face would prohibit such interaction, that document has not been tested and all evidence points to a method of operation different from that provided in the agreement. Until the partners believed their sharing arrangement threatened the success of their application, they operated in a manner consistent with their experience. Thus, Eastern was controlled by its owners in relation to their equity interest. For that reason, Eastern is not entitled to quantitative integration greater than Mr. Oyewole's 33 1/3% equity interest. Big Bay and CWA's proposals are significantly better since they propose 100% of their ownership to manage the station.

53. Neither Big Bay's principal, Robert Purcell, nor CWA's principal, Charles W. Adams, Jr., live in Cambridge or within the proposed primary service area. But both would move there. Mr. Adams, however, does have some association with the community, having participated in local community activities. In addition, Mr. Adams is black and has substantial radio broadcast experience. Robert Purcell does not have these qualitative enhancements and, therefore, CWA is to be substantially preferred for its qualitative integration proposal.

Comparative Coverage

54. CWA will serve the most people, with Big Bay ranked second, and Eastern last. CWA will serve 15,914 more people (46.97%) than Eastern, while CWA's advantage over Big Bay is 5,641 people (12.78%). Thus, on overall coverage, CWA is slightly preferred over Big Bay, and substantially preferred over Eastern. No applicant proposes to serve any white or gray area, while all applicants propose varying small degrees of coverage to underserved areas at night. Of greatest importance, Big Bay will provide some new third and fourth nighttime service while CWA will not. The Commission has awarded slight preferences to applicants providing substantially greater overall coverage even where the additional area to be served is already well-served by five or more existing services. *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Rev. Bd. 1984). Thus, Big Bay and CWA should be slightly preferred over Eastern. While CWA's overall coverage is superior to Big Bay's, Big Bay provides superior nighttime coverage to underserved areas. On balance, therefore, the coverage proposals of Big Bay and CWA are equally preferable over Eastern.

Summary comparison

55. Big Bay, CWA, and Eastern are equal on the diversity of ownership of media factor. While each proposes that a principal will manage, CWA is to be substantially preferred because of the qualitative attributes its principal provides in comparison to Big Bay. Eastern's qualitative claims have not been considered because it proposes only one-third as much integration as CWA and Big Bay. Eastern's comparative coverage is also not entitled to a comparative advantage over Big Bay and CWA, who are each superior to Eastern. Big Bay and CWA are, however, equal to each other on their coverage proposals. Since all the applicants propose auxiliary power, it is not a factor which influences the choice among the proposals. In this case, it is CWA's superior qualitative integration proposal that determines the award.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed April 8, 1988, supplemented May 16, 1988 and May 23, 1988 by Philip and Eleanor D'Adamo d/b/a D'Adamo Communications IS DENIED.

IT IS FURTHER ORDERED that the motion for leave to file, filed April 15, 1988 by Robert Purcell d/b/a Big Bay Broadcasting IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to file further supplement, filed May 23, 1988 by Philip & Eleanor D'Adamo d/b/a D'Adamo Communications IS GRANTED.

IT IS FURTHER ORDERED that the motion to strike, filed April 22, 1988 by Philip & Eleanore D'Adamo d/b/a D'Adamo Communications IS DENIED.

IT IS FURTHER ORDERED that Eastern Shore's motion to further enlarge issues against D'Adamo Communications, filed May 3, 1988 by Eastern Shore Broadcasting Limited Partnership IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the petition to dismiss, filed April 8, 1988 by Robert L. Purcell d/b/a Big Bay Broadcasting IS GRANTED to the extent indicated and DENIED IN ALL OTHER RESPECTS.

IT IS FURTHER ORDERED that the petition to dismiss, filed April 1, 1988, supplemented April 5, 1988, by Robert L. Purcell d/b/a Big Bay Broadcasting IS DENIED.

IT IS FURTHER ORDERED that the motion to dismiss, filed April 18, 1988 by Eastern Shore Broadcasting Limited Partnership IS GRANTED to the extent indicated and DENIED in all other respects.

IT IS FURTHER ORDERED that the motion to reopen the record for receipt of information respecting publication of notice of designation for hearing, filed May 6, 1988 by Eastern Shore Broadcasting Limited Partnership IS GRANTED.

IT IS FURTHER ORDERED that the applications of Robert L. Purcell d/b/a Big Bay Broadcasting (File No. BPH-851028MI), Philip & Eleanor D'Adamo d/b/a D'Adamo Communications (File No. BPH-851028ML), and Eastern Shore Broadcasting, Limited Partnership (File No. BPH-851028NG) ARE DENIED and the application of CWA Broadcasting, Inc. (File No. BPH-851028MJ) for a construction permit for a new FM station on Channel 232A at Cambridge, Maryland IS GRANTED. provided that Charles W. Adams, Jr. divests his interest in WANN(AM) Annapolis, Maryland before program test authority is granted.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Mr. Bruce A. Hassel
President
Baby Tenda of Cincinnati, Inc.
1762 Seymour Avenue
Cincinnati, Ohio 45237

Adopted: September 29, 1988; Released: November 7, 1988

Dear Mr. Hassel:

This refers to your October 16, 1987 letter styled as "a motion to reconsider and request for the full Commission to review" the decision of the Mass Media Bureau (Bureau) in *Taft Broadcasting Company*, DA 87-1419, 2 FCC Rcd 6622 (1987). That decision granted, among other things, the application to transfer control of Taft Broadcasting Company (now Great American Broadcasting Company) (hereinafter referred to as "Taft") from its shareholders to TFBA Limited Partnership. In taking that action, the Bureau also dismissed your petition to deny both the proposed transfer of Taft and the related renewal application for television station WKRC-TV, Cincinnati, Ohio.

By way of background, your petition asked the Commission to investigate certain news segments concerning your company which you claim were "staged" or "rigged" and were broadcast over WKRC-TV during September, 1985. Further, by letter dated September 22, 1987, you stated that you had learned that former Chairman Mark Fowler represented the transferee in this matter, and that fact requires an investigation into the propriety of any activity on his part in furtherance of the transfer application.

You now contend that the allegations you raised "did not receive a fair hearing." In that regard, you maintain that the Bureau's decision incorrectly characterized your pleadings as directed solely at the WKRC-TV renewal and transfer application, whereas your pleadings specifically requested denial of the applications to transfer all licenses held by Taft due to its alleged disregard for Commission rules. Further, you assert that the Bureau, in reaching its decision, ignored the "well documented evidence of serious violations" by the licensee. Such facts, you allege, required the Bureau to set the applications for hearing, and its failure to do so now mandates the Commission to take such action. In addition, you state that the Bureau did not address your charges of impropriety on the part of former Chairman Fowler. Therefore, you request a stay of the closing of the transfer until the completion of an investigation and hearing into any improper contacts in this matter between Mr. Fowler and FCC employees.

As to your assertion that the Bureau mischaracterized your pleading and ignored the evidence submitted in support of your claim, we are not persuaded that the Bureau's findings were incorrect or misapplied. Therefore, we conclude that reversal of the decision is not warranted on these grounds.

Your allegations of news staging and/or rigging are based on affidavits and depositions taken from various parties in connection with a defamation suit you assert that you are prosecuting against Taft and a WKRC-TV reporter. The standards used by the courts in defamation cases, however, differ from those applied by the Commission in reviewing allegations of news staging and/or rigging. In applying these standards, the Bureau correctly found that your allegations fell short of raising a "substantial and material question of fact," within the meaning of Section 309(d) of the Communications Act of 1934, warranting a hearing on these matters. The allegations contained in the pending civil complaint and submitted by you in the petition to deny did not meet the very high burden of pleading established by the Commission in dealing with allegations pending before us of improper news staging or rigging. *See Black Producer's Association*, 70 FCC 2d 1920, 1922 (1979), and the cases cited therein. This conclusion is not altered when viewed against either Taft as a Commission licensee in general, or the renewal and transfer application relating to WKRC-TV in specific. Therefore, your claim that the Bureau mischaracterized your pleadings as directed solely to WKRC-TV, as opposed to the licensee in general, is without merit and offers no basis for a contrary result.

The Commission's General Counsel responded by letter dated January 4, 1988, to your concerns regarding Mr. Fowler. Your allegations were examined and found to raise no questions of impropriety. We find no reason to disturb the General Counsel's ruling. Therefore, no further discussion of this matter is necessary.

Because the transfer of control of Taft was consummated on October 6, 1987, your request to stay the closing of that transaction, filed on October 16, is moot.

In sum, we have reviewed the Bureau's grant of these applications and conclude that the matter was fairly considered and properly decided. That decision set forth the reasons supporting the Bureau's action and we believe that rationale is justified and in the public interest. Other than your disagreement with that decision, your pleading largely restates allegations previously raised and considered by the Bureau and the Commission's General Counsel, and does not demonstrate any material errors in the Bureau's analysis of the facts or of the authority which supported its decision. Nor do you show the Bureau's action is in conflict with case precedent or Commission rules or policies. Therefore, we find no basis to reverse or modify the Bureau's decision.

Accordingly, your "motion to reconsider and request for full Commission review" IS DENIED, and your request to stay the consummation of the transfer of control IS DISMISSED AS MOOT.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster, III
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: "Motion to Reconsider and Request for the Full Commission to Review" the Mass Media Bureau's Grant of Applications to Transfer Control of Taft Broadcasting Company, and Request for a Stay of the Consummation of that Transaction, filed by Bruce A. Hassel.

I concur in the result, but Taft should understand that it came perilously close to violating Commission policy on news staging. According to the petitioner's affidavits, a WKRC-TV reporter:

1. Advised several customers of Baby Tenda that they might have legal recourse against the company.

2. Told at least one customer that the reporter would be filming at a local courthouse on a particular date.

3. Assisted at least one customer in filling out a complaint.

4. Reported on the air (apparently from the courthouse) that "the Clerk's Office of the Small Claims Court got a bit crowded this morning when several people came to file suite against the Baby Tenda company."

5. Failed to disclose on air his own role in generating the crowd or in helping customers to file complaints.

Nevertheless, as the Mass Media Bureau pointed out, the news story described real customers who appeared at the courthouse voluntarily and filed real complaints. Under established Commission precedent on news staging, Taft's conduct falls barely within the line of what is permissible. The Commission's policy is sound and reporters should not flirt with violating it as cavalierly as the WKRC reporter did.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 85-301

In the Matter of

Amendment of Parts 15 and 76
Relating to Terminal Devices
Connected to Cable Television
Systems

MEMORANDUM, OPINION AND ORDER

Adopted: October 13, 1988; Released: November 9, 1988

By the Commission:

I. INTRODUCTION

1. By this Memorandum, Opinion and Order the Commission grants in part[1] the petitions filed by the General Instrument Corp. (GIC), the National Cable Television Association (NCTA), Oak Communications, Inc. (Oak), and Scientific-Atlanta, Inc. (SCI),[2] seeking reconsideration in part of the decision in the Report and Order (Order) in the above captioned proceeding. [3] In that Order, the Commission adopted new regulations for cable system terminal devices (CSTDs), such as converters and decoders connected to cable systems.[4] The objective of the new regulations was to facilitate the marketing of CSTDs by establishing standards which were, in contrast to the past regulations, independent of ownership. The Commission believes that its decision in the Order achieves such a goal, and, therefore, with the exception of the changes discussed below, reaffirms its regulatory plan for CSTDs as adopted in that Order.

II. BACKGROUND

2. The Commission initiated this proceeding in 1985 to eliminate inconsistencies in its rules regarding CSTDs. The Commission determined that the existing rules were complex and confusing inasmuch as they subjected the same equipment to different regulations, depending on ownership. CSTDs owned by the subscriber were subject to Part 15 of the Rules, and required equipment authorization in order to be marketed. CSTDs under the control of the cable system operator, on the other hand, did not need any authorization, but needed to comply with Part 76 of the Rules.

3. The Commission found that applying two sets of standards to the same type of equipment was unnecessary and burdensome, and responded by adopting rules for CSTDs which were to be independent of ownership, as indicated in the *Order*. Specifically, the Commission decided that CSTDs were to be certified in accordance with Part 15 standards, as a marketing prerequisite. Under these new rules, manufacturers or any party assuming direct responsibility for the marketing of CSTDs would be required to obtain certification by the Commission showing compliance with Part 15 technical standards.[5] In addition, the Commission gave cable system operators the right to disconnect service to any subscriber whose CSTD caused the cable system to exceed the Part 76 signal leakage requirements. Further, the Commission required that holders of grants of certification inform the user of a device regarding the interference potential of the device, simple measures to take to correct the interference, and the conditions under which the device is allowed to operate. The Commission also decided to require holders of the grant of certification to provide users with any specialized hardware which might be necessary to properly connect keep the equipment to a TV receiver.

III. SUMMARY OF PETITIONS FOR RECONSIDERATION

4. In July 1987, GIC et al. filed petitions for reconsideration requesting that the Commission amend its decision in the Order. In general, the petitioners state that the new rules would raise the retail cost of cable terminal equipment, and expand the Commission's workload. The petitioners estimate that manufacturers would have to spend anywhere from 40 to 75 million per year to comply with the requirements adopted in the Order. The petitioners state that such an economic impact on the industry could be avoided by a change in the Commission's decision on the following: 1) the radiated emissions limits for CSTDs; 2) the output signal limits; 3) the responsibilities of cable system operators; and, 4) the equipment certification requirement. Also, some of the petitioners have requested clarification of the rules for multifunctional or composite devices, and for the requirements to provide the user with instructional material. Three parties commented on the petition for reconsideration. Zenith Electronics Corporation (Zenith) and the American Radio Relay League, Inc. (ARRL) voice their support for the petitions for reconsideration filed by NCTA. The Association of Maximum Service Telecasters (MST), while also supporting a review of the Commission's decision in the Order, disagrees with the alternatives offered by the petitioners.

IV. DISCUSSION & DECISION

A. Radiated emission limits.

5. In the *Order*, the Commission decided to apply the radiated emission limits specified for TV interface devices in Part 15, Subpart H of the Rules to CSTDs. All facilities from headend to the point of connection to the CSTD within the premises of the subscriber would be subject to Part 76 signal leakage requirements, while converters and other subscriber equipment would be subject to Part 15, Subpart H, radiated emission limits.[6]

6. *NCTA and SCI Alternate Proposals.* NCTA and SCI argue that the radiation limits for CSTDs are more liberal than those for the cable system, and, therefore, when these CSTDs are installed, they may cause the cable system to exceed the relevant signal leakage limits. NCTA continues to support its earlier proposal that the Commission "distinguish between emissions from internally generated sources of radiation (such as local oscillators) and emissions of signals that are introduced into the terminal device by the cable system." NCTA suggests that radiation from the CSTD with no input signals and tested on an

open field site should be subject to Part 15 limits, and that radiation from the CSTD resulting from the introduction of input signals be subject to Part 76 limits. SCI concludes that a "permanent solution . . . would be to require the same radiation performance of all consumer equipment [CSTDs] as well as cable systems." SCI recommends that the more conservative Part 76 emission limits should be adopted for both CSTDs and cable systems.

7. *Responses.* In general, Oak supports the Commission's decision regarding radiated emission limits. Zenith and the ARRL specifically endorse NCTA's proposal. MST, while it concurs with the petitioners that Part 76 limits are preferable because they are lower, particularly in the 54 to 216 MHz range, disagrees with the NCTA proposal to apply dual standards to CSTDs. MST endorses SCI's proposal for a single standard for both cable systems and terminal devices.

8. *Decision.* We agree with the petitioners that the application of Part 76 emission limits to CSTDs would be the surest way to prevent harmful interference. However, we are not convinced that such a conservative measure is necessary or in the public interest. The Part 76 emission limits were designed to apply to open air cable installations[7] where radiated emissions would not be attenuated significantly by surrounding structures. CSTDs, on the other hand, are located within subscriber premises and share a common environment with other devices (cable-ready television receivers or VCRs) which are connected to cable systems. Although those devices are presently allowed higher emission levels than the cable system, they have historically demonstrated that they are not a threat to the operation of the cable system or to other radio services. Therefore, we feel that it would be unnecessarily burdensome and costly to require manufacturers of CSTDs to comply with tighter emission standards when their devices pose no greater threat than cable-ready television receivers or VCRs. In addition, it should be noted that the Commission has already certified CSTDs under Part 15, Subpart H of the Rules, and that compliance with the Part 15 emission limits appears to have no deleterious effect on cable systems. Consequently, we are not convinced by the petitions and the comments in this proceeding that the emission limits of Part 76 are necessary for CSTDs or that the emission limits of Part 15, Subpart H, are inadequate. Therefore, we will maintain our decision in the Order to apply the Part 15, Subpart H, emission limits to CSTDs.

B. Output Signal Limits.

9. The petitioners argue that compliance with the output signal limits adopted in the Order, as specified in Sections 15.604 and 15.608,[8] would be difficult to achieve without redesigning their equipment, especially in the case of heterodyne CSTDs. GIC, NCTA, and SCI state that the output signal limits in question were established to prevent excessive signal emission in cases where consumers might inadvertently connect a computer or VCR to an antenna. These petitioners, therefore, question the need for output signal limits for CSTDs since they feel that the use of an antenna becomes unnecessary in the case of CSTDs.

10. GIC estimates that the additional circuitry required to bring its heterodyne units into compliance with the output signal limits would increase the retail price of a converter by 12% to 40%, and that 75% of all CSTDs manufactured are of the heterodyne design. Such an increase, GIC argues, might price its products out of the market. Also, GIC finds that the low output signal limits adopted would degrade the performance of its products. In particular, GIC is concerned about the +9.5 dBmV maximum permissible level for 75 ohm output impedance units, as specified under Section 15.604. GIC indicates that it is common to find, at the output of any type of CSTD, signal levels of +15 to +20 dBmV. A decrease in the output signal levels currently used, GIC argues, would restrict the effectiveness of the carrier-to-noise ratio, and eventually lead to poorer picture quality.

11. For these reasons, GIC recommends that the Commission raise by 12 dB the output signal limits, and that any switch used with CSTDs meet the isolation standards adopted for cable input selector switches in Docket 87-107.[9] Such a level, GIC states, is necessary to avoid television receiver adjacent channel interference from off-the-air TV signals which may provide a signal level as high as +40 dBmV. Also, GIC emphasizes that compliance with the out-of-band output limits of Section 15.608 is virtually impossible to achieve in the case of heterodyne CSTDs which, unlike baseband units, have more than one output "carrier" frequency.

12. NCTA, in similar comments, adds that if the Commission decides not to reconsider its decision with respect to output signal limits, it should allow three years for the industry to comply with the new regulations in order to diminish the economic impact. NCTA proposes that a maximum gain of 7 dB in lieu of output signal limits could be imposed on heterodyne CSTDs to continue to assure high picture performance without raising the risk of interference to broadcast reception.

13. SCI generally supports the position taken by GIC and NCTA. Oak warns that the Commission's assertion in the *Order*, that compliance with the output signal limits will not add significantly to the cost of CSTDs, is not entirely correct. Oak indicates that only for new designs can the cost of compliance be minimized, and finds that placing a limit on the gain (10 dB maximum) of the input signals is more appropriate, and would be successful in controlling interference.

14. *Responses.* Zenith endorses NCTA's position while MST expresses its support for the application of output signal limits as specified in the Order. MST contends that petitioners have not presented any new arguments to the Commission warranting a change in policy. MST emphasizes that the only new consideration made in the petitions is that of imposing sufficient isolation requirements for cable input selector (A/B) switches as a countermeasure to limiting output signal levels.

15. *Decision.* The petitioners have made a convincing argument that, in the case of heterodyne CSTDs, it may be difficult to achieve compliance with the output signal limits and associated Rules within the implementation time allowed in the *Order*. It appears that the most viable solution is to relax the actual output signal limits. The alternative presented by some petitioners, to limit the gain of the CSTDs, would not properly address the problem. The potential for interference lies with the strength of the output signals. A limit on the gain of a unit will still not assure that the output signal levels are low enough to minimize the risk of interference since substantially high input signals may be found in some cable installations.

16. In a parallel proceeding, Gen Docket 87-107,[10] the Commission established isolation standards for cable input selector switches (commonly known as A/B switches) on

the basis that typical maximum output signal levels of CSTDs were approximately +15.5 dBmV and +21.5 dBmV for units with 75-ohm and 300-ohm output impedance, respectively.[11] Based on the comments received in that proceeding, the Commission found that these levels were typical for CSTD operation. The Commission also concluded that appropriate isolation for a switch used in conjunction with cable television reception would be 80 dB from 54 to 216 MHz inclusive, and 60 dB from 216 to 550 MHz. Therefore, we are modifying our requirements to be +15.5 dBmV (75-ohm output impedance) and +21.5 dBmV (300-ohm output impedance) as the output signal limits for CSTDs. In addition, any switch used with CSTDs must meet the isolation requirements adopted in Docket 87-107 as suggested by the petitioners. This increase in output signal limits should provide equipment design flexibility and cable television reception signal levels without raising the likelihood of interference.[12] Finally, any TV interface device and accessories (including switches) designed to operate in one of its modes as a CSTD will have to comply with the requirements for CSTDs when operating in that mode.[13]

C. Authorization Requirement.

17. *Request for Verification by GIC, NCTA, and SCI.* These petitioners claim that the certification requirements established in the Order will delay the introduction of their products in the marketplace, and will increase the Commission's workload. These petitioners also submit that this action consitutes an unepxlained change in policy for the Commission. They cite changes to the Rules in 1984 that made receivers regulated under Part 15, Subpart C subject to notification or verification.[14] Verification by manufacturers would be sufficient, these petitioners argue, since the overall system is always under the control of the operator. They state that, under verification, while manufacturers would not need an equipment authorization from the Commission in order to market their products, they would still need to test them to insure compliance with the relevant standards.

18. *Request for Notification by Oak.* While Oak also considers the application of the certification requirements burdensome, it opposes the application of the verification procedure to these devices. Oak states that notification, which requires manufacturers or other parties responsible for the marketing of a unit to obtain an equipment authorization from the Commission, is a more suitable alternative. Oak submits that notification has proven to be efficient and in the public interest when applied to CSTDs subject to the provisions of Part 15, Subpart C.[15]

19. *Decision.* The request by some of the petitioners to subject CTSDs to the verification procedure are based on the premise that the Commission has been applying this procedure to receivers since 1984 as a result of action taken in Gen Docket 83-10. In fact, in that proceeding, only FM and television broadcast receivers were placed under verification. Receivers associated with transmitters operating under the provisions of Section 15.201 et seq., receivers containing superregenerative circuitry, and CB receivers continued to be subject to certification. All other receivers were placed under notification. The Commission concluded that the interference potential of non-broadcast receivers was reltatively high and indicated that the public interest would be better served if such devices remained under either the certification or notification procedures, depending on the type of equipment.[16] Also, the Commission usually places under verification only equipment that has a long history of compliance. Therefore, the contentions of some of the petitioners that most receivers are subject to verification and that the Commission's decision in the *Order* reflects a change in policy in its authorization program with respect to receiving equipment, are unfounded.

20. We find that Oak's suggestion to place CSTDs under the notification procedure to be a more appropriate solution. Under notification, the Commission will still be able, if it wishes, to obtain measurement data on the equipment prior to its being marketed. However, the procedures involved for obtaining an equipment authorization will not be as detailed as those required for certification. We believe that any adverse impact that might occur due to the application of a more relaxed authorization procedure would be offset by the fact that the use of CSTDs will always be under the ultimate control of the cable system operator since the latter will have the right to disconnect interfering CSTDs from the cable system.

D. Responsibilities of Cable System Operators.

21. NCTA opposes the Commission's decision to give cable system operators the right, under Section 76.617 of the Rules, to disconnect service to any subscriber whose CSTD interferes with the cable system.[17] NCTA feels that giving such a right to operators would be unfair to subscribers because some might be refused service by a particular operator, even though their equipment might be in compliance with the regulations, if the operator believes that the connection of a specific CSTD may cause the system to exceed the signal leakage requirements.

22. *Decision.* NCTA's interpretation of Section 76.617(a) is incorrect. This rule is intended to set forth the responsibilities of cable subscribers and operators with respect to signal leakge reasulting from the connection of subscriber-owned CSTDs to the cable system. The portions of this rule that address disconnection of subscriber-owned equipment are intended to clarify a cable system operator's responsibilities in situations where it finds actual signal leakage from such a device that would cause interference outside the subscriber's premises and/or cause the cable system to exceed the signal leakage limitations in Part 76 of the Commission's Rules. The rule simply says that in such situations, the only action a cable operator is required to take is to discontinue service until the problem, which is the responsibility of the subscriber, is corrected. It does not address the case where the cable system operator believes that a specific subscriber-owned terminal might cause signal leakage problems. In fact, neither Section 76.617(a) nor any other portion of the Commission's Rules provide cable subscribers the right to connect their own terminal equipment to a cable system. Unless specified in its agreement with its local franchise authority or in individual subscriber agreements, a cable system operator has every right to proscribe the use of specific types of subscriber-owned terminal equipment or to prohibit the use of subscriber-owned terminal equipment entirely if it chooses. Accordingly, we are denying NCTA's request to modify Section 76.617.

E. Compliance Schedule.

23. Some of the petitioners have asked that up to three years be given to implement the new regulations. While we find such a period of time too lengthy, we do recognize that more time then previously estimated is needed to

bring CSTDs, particularly those employing heterodyne techniques, into compliance with the new regulations. We note that, in a parallel proceeding, Gen Docket 87-107, the Electronics Industries Association has stated that, in general, it takes a manufacturer from 79 to 97 and from 99 to 134 weeks, to implement minor and major design changes, respectively, in video equipment. Therefore, we will require that CSTDs manufactured or imported on and after July 1, 1990, must comply with the new regulations. Prior to July 1, 1990, manufacturers will have the option of designing their products to comply either with the new regulations or the provisions of Part 76. This delayed implementation and relaxation will also be applied to central distribution CSTDs that are not part of a cable system but are used to distribute video signals to multiple subscribers in apartments or office buildings.[18]

V. CLARIFICATION OF RULES

A. Composite or Multifunctional Devices.

24. SCI submits that the applicability of Section 15.618(c) of the Rules is uncertain. SCI is uncertain whether this rule requires CSTDs to meet the emission limits of Subpart C of Part 15 applicable to the tuner portion of a television receiver.[19] In addition, Zenith requests that CSTDs be excluded from the all-channel requirements as specified under Section 15.618(d) if a definition of a TV tuner is not included in the regulations.

25. *Commission Clarification.* The language used in Section 15.618 in the Order was designed to exclude CSTDs from having to meet the emission limits of Subpart C of Part 15 applicable to TV tuner sections.[20] The Commission's intent was to make CSTDs that are not part of a television receiver subject only to the emission limits of Subpart H of Part 15. The Commission in another proceeding, Gen Docket 87-389, has proposed to adopt only one set of emission limits for unintentional radiators.[21] The limits proposed in that proceeding are the same as those currently specified under Part 15, Subpart H. The all-channel requirements of Sections 15.65 to 15.68 apply only to TV broadcast receivers and TV interface devices which incorporate a TV tuner and which are equipped with antenna terminals for the off-the-air reception of TV broadcasting (Part 73 of the FCC Rules) signals. Therefore, the all-channel requirements would only apply to CSTDs which are configured in this manner. In addition, we believe that the inclusion in the rules of a definition of the term "TV tuner" is not necessary. Sections 15.65 to 15.68 of the Rules provide sufficient guidance as to the meaning of the term "TV tuner." In addition, we find that a clarification of the Commission's policy on the emission limits for multifunctional CSTDS is warranted in general. In the event that a device includes a CSTD and a low power communication or other device, we will apply both the emission limits adopted herein for CSTDs as well as those applicable to the other section of the multifunctional device. Whichever emission limits are higher on each frequency will be allowed if both sections of the multifunctional device can be operated simultaneously.

B. Information to the User.

26. SCI states that the interconnection requirements of Section 15.602 of the Rules are unclear. While SCI endorses the Commission's decision to require manufacturers or holders of grants of certification to provide the public with information on the types of accessories utilized with a particular CSTD (cables, etc.), it finds the language used confusing and vague. More precisely, it asks the Commission to explain further what is meant by the terms "generally available" in the Order[22], and "specialized cables," in Section 15.602 of the Rules.

27. *Commission Clarification.* The term "generally available" in the Order, refers to accessories that can be found in retail stores and/or that can be readily obtained by mail *order* by the consumer. The term "specialized cables" in Section 15.602(B) means cables that are not generally available from retail stores or that have been designed expressly for a particular unit by the manufacturer or holder of the equipment authorization grant. An example of such a specialized cable might be a shielded cable whose impedance or design is not typical of that found in cables purchased off-the-shelf from retail stores. The Rules are being amended accordingly to clarify the Commission's intent.

C. Methods of Measurements.

28. NCTA requests that the procedures followed by the Commission to test TV interface devices be modified for CSTDs. It asks that an RF input signal (at 3 dBmV) be used instead of a baseband video signal to feed through the device under test for evaluating heterodyne CSTDs. Oak is also concerned about the general design requirements of Section 15.614(a) which deals with the use of circuitry to prevent emanation levels from exceeding the limits when a unit is fed with video input signals in the range of 1 to 5 volts. Such a requirement is irrelevant to CSTDs which have no video input ports and which are fed RF input signals of at least 1mV (for 75 ohms impedance) and 2 mV (for 300 ohms impedance).

29. *Commission Clarification.* The methods of measurements used to test TV interface devices, including CSTDs, are specified in FCC/OST MP-3, "FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics, and Radio Noise Emissions," (1985). Deviation from the procedures, as proposed by NCTA, to account for differences in operating characteristics of particular units is acceptable. For example, a 0 dBmV to 25 dBmV RF video input signal could be used to test heterodyne CSTDs instead of the 1 to 5 volts recommended in MP-3. We advise that prior to using alternate procedures, the FCC laboratory should be contacted for guidance. In response to the question raised by Oak with respect to the general design requirements in Section 15.614(a), these requirements were designed to apply primarily to TV interface devices with provisions for input of external baseband video signals. They do not apply to heterodyne CSTDs or TV interface devices with no provisions for an external baseband video source.

D. Reorganization of Part 15, Subpart H.

30. In order to avoid any further confusion concerning the applicability of the new rules to CSTDs and other TV interface devices, we have taken this opportunity to restructure and to simplify the format of Part 15, Subpart H.[23] In addition, changes recently made in Part 15, Subpart H, in Gen Docket 87-107, have been incorporated into the reorganization of the rules. These changes concern the use of cable input selector switches.[24] Beyond the changes discussed above, there have been no changes to the rules adopted herein.

VI. PROCEDURAL MATTERS

31. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's revised final analysis is as follows:

I. Need for and purpose of the rules.

The Commission's rules inconsistently apply different standards to cable system terminal equipment based on their ownership and design considerations. These differences range anywhere from the technical standards themselves, to the operating conditions, and authorization requirements. The purpose of the rules adopted herein is to overcome these discrepancies.

II. Summary of issues raised by petitioners in response to the final regulatory flexibility analysis, Commission assessment and changes made as a result.

A. *Issues raised.* No petitioning or commenting parties specifically addresses the final regulatory flexibility analysis. However, most petitioning parties did address the probable economic burden that they would incur as a result of the new regulatory plan. The necessary design modifications on cable system terminal equipment would not only have an impact on the manufacturing industry, but on the subscriber as well. The petitioners estimated that the additional circuitry needed to bring equipment into compliance with the new regulations would increase the retail cost of a unit anywhere from 12% to 40%. Such an impact would be considerable when up to 75% of the equipment would need to be modified. The revised regulatory plan is expected to resolve these concerns.

B. *Assessment.* The revised regulatory plan will reduce the burden of compliance significantly since it will be implemented more gradually and will not require manufacturing companies to redesign their products immediately, if redesign is necessary. Although the revised regulatory plan will still impose certain burdens on manufacturing companies, these burdens are the minimum necessary to ensure that terminal devices are more readily available and that such devices do not cause interference.

C. *Changes made as a result of petitions and comments.* While no reconsideration or comments concerning the final regulatory flexibility analysis were filed, alternate regulatory plans were presented. Our revised plan takes these suggestions into account and considers the impact of our regulations on business entities (small included) in both the cable and manufacturing industries. The impact of the revised plan will be easier for the manufacturing industry, in particular, to absorb since it will be implemented over a relatively long period of time, and will permit existing inventories to be depleted.

III. Significant alternatives considered and rejected.

We have considered all the arguments and alternatives presented in the petitions and comments applicable to the Report and Order. After consideration of the issues raised herein, we have revised the rules to resolve the petitioners' concerns where possible, consistent with our objective of ensuring that cable system terminal equipment does not cause interference to authorized radio services.

32. The Secretary shall cause a copy of this *Memorandum Opinion and Order* to be sent to the Chief Counsel for Advocacy of the Small Business Administration.

33. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget by that Act.

VII. ORDERING CLAUSES

34. Pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act and Section 1.106 of the Commission's Rules, *IT IS ORDERED* That the petitions for reconsideration of the Report and Order filed by parties named herein *ARE GRANTED* to the extent indicated above, and *ARE DENIED* in all other respects. In addition *IT IS ORDERED* That Parts 15 and 76 be amended, as shown below, effective **December 16, 1988.**

35. *IT IS FURTHER ORDERED* That this proceeding *IS TERMINATED.*

VIII. RULES CHANGES

36. Part 15 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 15 -- RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 is revised to read as follows:

Authority: Secs. 4, 302, 303 and 307 of the Communications Act of 1934, as amended; 47 U.S.C. 154, 302, 303 and 307.

2. Section 15.4 is amended by revising paragraph (u), and by adding a paragraph (x) to read as follows:

Section 15.4 General definitions.

* * * * *

(u) *TV interface device:* A restricted radiation device that produces or translates in frequency a radio frequency carrier modulated by a video signal derived from an external or internal signal source, and which feeds the modulated radio frequency energy by conduction to the antenna terminals of a television receiver. Examples of TV interface devices are video cassette recorders, and terminal devices attached to a cable system or used with a Master Antenna (including those used for central distribution video devices in apartment or office buildings).

Note: A TV interface device may be a stand-alone RF modulator, or a composite device consisting of an RF modulator, video source and other components devices.

* * * * *

(x) Cable system terminal device: A TV interface device that serves, as its primary function, to connect a cable system operated under Part 76 of this Chapter to a television receiver or other subscriber premise equipment. Any device which functions as a cable system terminal device in one of its operating modes must comply with the technical requirements for such devices when operating in that mode.

* * * * *

3. Subpart H of Part 15 of Title 47 of the Code of Federal Regulations is revised to read as follows:

SUBPART H - TV Interface Devices (Including Cable System Terminal Devices) and Associated Accessories

Section 15.602	Cross reference.
Section 15.604	General operating conditions.
Section 15.606	Additional operating conditions for cable system equipment.
Section 15.608	Equipment authorization.
Section 15.610	Specific authorization requirements for TV interface device kits.
Section 15.612	Composite devices.
Section 15.614	Compliance schedule.
Section 15.620	General technical requirements.
Section 15.622	Field strength limits.
Section 15.624	Conducted voltage limits.
Section 15.626	Output signal limits.
Section 15.630	Transfer switch requirements.
Section 15.640	Identification of equipment.
Section 15.642	Identification of TV interface device kits.
Section 15.644	Information to the user for cable system terminal devices.
Section 15.646	Requirements for wires and coaxial cables.
Section 15.650	Methods of measurements.

Section 15.602 Cross reference.

The provisions of Subparts A and B of this part and Subparts I, J and K of Part 2 of this Chapter shall apply to a TV interface device. Also, a cable system terminal device and a cable input selector switch shall be subject to the relevant provisions of Part 76 of this Chapter.

Section 15.604 General operating conditions.

(a) Operation of a TV interface device is subject to the general operating conditions set forth in Section 15.3 of this Part.

(b) The operator of a TV interface device shall promptly stop operating the device when that operator is advised by the Commission that the TV interface device is causing harmful interference, and shall not resume its operation until the condition causing the harmful interference has been corrected.

(c) A TV interface device shall at all times comply with the requirements of this subpart.

Section 15.606 Additional operating conditions for cable system equipment.

The provisions of Part 76 of this chapter concerning responsibility for interference shall apply to cable system terminal devices and cable input selector switches.

Section 15.608 Equipment authorization.

(a) A device operating under the provisions of this subpart shall be authorized pursuant to Subpart J of Part 2 of this Chapter showing compliance with the technical specifications in this subpart. To determine compliance, a device must be fully exercised with all the external devices and accessories that are intended to be used with it.

Type of device	Authorization
TV interface device, unless otherwise specified	Certification
Cable system terminal device	Notification
Stand-alone cable input selector switch	Verification

(b) An external device or accessory that is intended to be attached to a TV interface device shall comply with the technical and administrative requirements set out in the rules under which it operates. For example, a personal computer must be certificated to show compliance with Subpart J of this part.

(c) A device operating under the provisions of this subpart that is submitted to the Commission as a composite device in a single enclosure containing an RF modulator, video source and other component devices shall be submitted on a single application (FCC Form 731) and shall be authorized as a single device.

Section 15.610 Specific equipment authorization requirements for TV interface device kits.

A TV interface device marketed as a kit shall comply with the following requirements:

(a) All parts necessary for the assembled TV interface device to comply with the technical requirements of this subpart must be supplied with the kit. No mechanism for adjustment that causes operation in violation of the requirements of this subpart shall be made accessible to the builder.

(b) Assembly of two TV interface device units of a specific type shall be made in accordance with the instructions being supplied with the product being marketed. If all components required to fully complete the kit (other than those specified in paragraph (a) of this section) are not normally furnished with the kit, assembly shall be made using the recommended components. The assembled unit shall be authorized as any other TV interface device.

(c) The measurement data required for equipment authorization shall be obtained for both of these units and submitted, when required, with an application for authorization.

(d) A copy of the exact instructions that are provided for assembly of the device shall be submitted with the application for authorization in addition to other material required in Part 2 of this chapter.

Section 15.612 Composite devices.

A composite TV interface device shall comply with the requirements of this subpart, except for the following:

Type of composite TV interface device	Applicable technical standards
TV interface device with TV broadcast tuner and antenna terminals, unless otherwise specified	Subpart C of Part 15 for TV broadcast tuner (including all-channel requirements of Sections 15.65-68) and Subpart H of Part 15.
TV interface device with field disturbance	Subpart F of Part 15 for sensor emanations and Subpart H

sensor	of Part 15 for other emanations whichever are higher for each frequency.
Cable system terminal device with TV broadcast tuner and antenna terminals	Subpart H of Part 15 and all-channel requirements of Sections 15.65-68.
Cable system terminal device with a low power communicationdevice	Subpart H of Part 15 and emanation limits for the low power communication device whichever are higher for each frequency.

Section 15.614 Compliance schedule.

(a) *For TV interface devices* - TV interface devices that have been type approved as Class I TV devices prior to April 28, 1983, and that have been labeled with an FCC type approval number may be marketed and operated indefinitely subject only to the non-interference and general requirements of Sections 15.3, 15.604 and 15.620. TV interface devices that have been authorized as such prior to April 28, 1983 by a grant of a waiver of the Rules, may continue to be marketed and operated under the provisions of this subpart without further action on the part of the grantee.

(b) *For cable system terminal devices* - Cable system terminal devices manufactured or imported on and after July 1, 1990 shall comply with the provisions of this subpart. Cable system terminal devices manufactured or imported prior to July 1, 1990, shall have the option of complying either with the provisions of this subpart or with the technical specifications of Part 76 of this chapter.

(c) *For cable input selector switches* - Stand-alone mechanical switches manufactured or imported on or after August 19, 1988, and stand-alone electronic switches manufactured or imported on or after October 28, 1988, shall be subject to the provisions of this subpart. Switches manufactured or imported prior to the dates given in this paragraph need only to comply with the provisions of Section 15.3 and Part 76 of this chapter.

Section 15.620 General technical requirements.

(a) A TV interface device shall incorporate circuitry to automatically prevent emanations from the device from exceeding the technical specifications in this subpart. These circuits shall be adequate to accomplish their function when the TV interface device is presented, if applicable, with video input signal levels in the range of 1 to 5 volts; this requirement is not applicable to TV interface devices that use RF input signals or that incorporate built-in signal sources and have no provisions for the connection of external signal sources.

(b) The TV interface device must be so constructed that adjustments of any control accessible to the user will not cause operation in violation of the requirements of this subpart.

(c) The TV interface device shall be designed and constructed, to the extent practicable, so as to preclude the possibility that the consumer may inadvertently attach the output of the device to the receiving antenna, if any.

Section 15.622 Field strength limits.

The field strength of any electromagnetic energy radiated from the cabinet, control circuitry and power leads of a device including that radiated from any associated accessories or attachments shall not exceed the following limits:

Frequency (MHz)	**Field strength measured CISPR quasi-peak (uV/m at 3 meters)**
30- 88	100
88- 216	150
216-1000	200

NOTES: 1. The lower limit shall apply at the edge of two frequency bands.

2. The output terminal of a device shall be terminated by a resistance equal to the rated output impedance.

Section 15.624 Conducted voltage limits.

The RF voltage measured between each power line and ground at the power terminals of a TV interface device shall not exceed 250 microvolts at any frequency between 450 kHz and 30 MHz, inclusive.

Section 15.626 Output signal limits.

(a) The output signals of a TV interface device shall be coupled to the TV receiver by either wires or coaxial cable.

(b) The voltage corresponding to the peak envelope power of the modulated signal during maximum amplitude peaks across a resistance (R ohms) matching the impedance of a TV interface device shall not exceed the following:

Type of Equipment	Maximum voltage measured RMS (microvolts)	
	video	audio
TV interface device, unless otherwise specified	346.4 square root(R)	77.5 square root(R)
Terminal device attached to a cable system or used with a Master Antenna (including those used for central distribution in apartments or office buildings)	692.8 square root(R)	155 square root(R)

(c) At any RF output terminal, the maximum voltage of any emission appearing on frequencies removed by more than 4.6 MHz below or 7.4 MHz above the video carrier frequency on which the TV interface device is operated shall not exceed the following:

Type of Equipment	Maximum voltage measured RMS (microvolts)
TV interface device, unless otherwise specified	10.95 square root(R)
Terminal device attached to a cable system or used with a Master Antenna (including those used for central distribution in apartments or office buildings)	692.8 square root(R)

Notes

1. R (in ohms) is the resistance matching the rated output impedance of the device.

2. Heterodyne terminal devices attached to a cable system (including those used for central distribution in apartments or office buildings) manufactured or imported prior to July 1, 1990, do not have to meet the levels specified above.

Section 15.630 Transfer switch requirements.

When measured in either position, transfer switches shall comply with the following requirements:

Type of Equipment	Transfer switch	Required isolation (dB)	Maximum voltage at receiving antenna input terminals (microvolts)
TV interface device, unless otherwise specified	Mandatory	Not applicable	0.346 square root(R)
Terminal device attached to a cable system	Mandatory, if equipped with antenna input capability	80 dB from 54 to 216 MHz 60 dB from 216 to 550 MHz	Not applicable

Notes:

1. R (in ohms) is a resistance matching the rated impedance of the antenna input of the switch.

2. The maximum voltage corresponds to the peak envelope power of the video modulated signal.

3. A transfer switch is not required for a TV interface device that, when connected, results in the user no longer having any need to to receive standard over-the-air broadcast signals via a separate antenna.

4. A transfer switch is not required for a device that is intended to be used as an accessory to an approved TV interface device.

Section 15.640 Identification of equipment.

Type of equipment	Language on name plate or label
TV interface device, unless otherwise specified	This device complies with FCC Rule Part 15. Operation is subject to the following two conditions: (1) This device may not cause harmful interference and (2) this device must accept any interference that may be received, including interference that may cause undesired operation.
TV interface device that does not receive standard over-the-air broadcast signals	This device is intended to be attached to a TV receiver, which does not receive over the air broadcast signals. Connection of this device in any other fashion may cause harmful interference to radio communications and is in violation of the FCC Rules, Part 15. See 47 CFR Part 15, Subpart H.
Stand-alone cable input selector switch	This device is verified to comply with FCC Rules Part 15 for use with cable television service.

Section 15.642 Identification of TV interface device kits.

In lieu of the labeling requirements of Section 15.640, the following label shall be included in the kit with instructions to the builder that it should be attached to the completed kit:

CERTIFICATION LABEL
(Manufacturers Name)
FCC ID –

This assembled device can be expected to comply with Subpart H of Part 15 of FCC Rules, provided it is assembled in exact accordance with the instructions provided with this kit.

Name, Title, and Signature of Company Official

STATEMENT OF COMPLIANCE

I certify that I have constructed this kit in exact accordance with the instructions provided with this kit using only the parts provided or recommended by the manufacturer. I understand that the operation of the assembled devices is subject to the following two conditions: (1) This device may not cause harmful interference and (2) this device must accept any interference that may be received, including interference that may cause undesired operation.

Section 15.644 Information to the user for cable system terminal devices.

Information shall be provided to the user of a cable system terminal device about its interference potential and simple measures that a user can take to correct interference. Such information shall be included in a conspicuous place in the instruction manual. If a manual is not provided to the user then such information should be on a pamphlet, on the device itself, or on the packaging.

Section 15.646 Requirements for wires and coaxial cables.

(a) For TV interface devices - Wires or coaxial cables to couple the output signals to the TV receiver shall be provided by the manufacturer.

(b) For cable system terminal devices - The holder of the grant of authorization for a cable system terminal device shall specify in the instruction manual or pamphlet, if a manual is not provided, the type of wires or coaxial cables necessary to ensure that the unit complies with the requirements of this subpart. The holder of the grant of authorization must provide any wires, coaxial cables or other accessories which are not readily available to the user via retail outlets or mail-order catalogs.

Section 15.650 Methods of measurements.

To determine compliance with the provisions of this subpart the following procedures or equivalent, provided the applicant or manufacturer can demonstrate to the Commission that such procedures are, in fact, equivalent shall be used:

-- *For TV interface devices:* FCC/OST MP-3, "FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics, and Radio Noise Emissions," (1985).

-- *For cable input selector switches:* FCC/OET MP-9, "FCC Procedure for Measuring Cable Television Switch Isolation," (September 1987).

Note: MP-3 and MP-9 are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfiled, VA 22161 or from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office.

37. Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to reads as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 76.5(x) is amended by adding a note as follows:

Section 76.5 Definitions.

* * * * *

(x) * * *

NOTE: Terminal devices interconnected to subscriber terminals of a cable system shall comply with Subpart H of Part 15.

* * * * *

3. Section 76.617 is revised to read as follows:

Section 76.617 Responsibility for interference.

Interference resulting from the use of cable system terminal equipment (including subscriber terminal, input selector switch and any other accessories) shall be the responsibility of the cable system terminal equipment operator in accordance with the provisions of Part 15 of this chapter: provided, however, that the operator of a cable system to which the cable system terminal equipment is connected shall be responsible for detecting and eliminating any signal leakage where that leakage would cause interference outside the subscriber's premises and/or would cause the cable system to exceed the Part 76 signal leakage requirements. In cases where excessive signal leakage occurs, the cable operator shall be required only to discontinue service to the subscriber until the problem is corrected.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Part 15, Subpart H, of the Rules is being amended and restructured in its entirety to avoid any possible confusion in the applicabillity of the new rules to CSTDs and other TV interface devices. References to Part 15, Subpart H of the Rules in this document apply to the old Section designations. The new Section designations are only used in the amendatory language in part VIII of this document entitled "Rules Changes."

[2] All petitioners are manufacturers of CSTDs, with the exception of NCTA which represents the interests of owners and operators of cable systems, equipment manufacturers, and other businesses affiliated with the cable television industry.

[3] *See Report and Order*, Gen Docket No. 85-301, 2 FCC Rcd 3304 (1987).

[4] Terminal devices used with a Master Antenna have operating characteristics which are similar to those of CSTDs, and for such reasons are covered by the changes made herein.

[5] *See Order*, at paras. 27-28. The Commission placed CSTDs under certification, a procedure applied to all TV interface devices, to assure compliance with the standards and avoid any confusion that might arise in determining the applicable authorization procedure in the case of composite devices. A grant of authorization from the Commission would be issued based on desk review of the application. In cases where the Commission

believed that additional testing of a unit might be warranted,it could request, in accordance with the provisions of Part 2 of its Rules, a sample prior to, or after issuing the grant.

[6] *See* Sections 15.610 and 76.605 of the Rules. The permissible emission levels under Part 15, when measured with a quasi-peak detector, are 100 uV/m at 3 meters from 30 to 88 MHz, 150 uV/m at 3 meters from 88 to 216 MHz. and 200 uV/m at 3 meters from 216 to 1000 MHz. The permissible emission levels under Part 76, when measured with a RMS (root-mean-square)detector, are 150 uV/m at 3 meters below 54 MHz, 20 uV/m at 3 meters from 54 to 216 MHz, and 150 uV/m at 3 meters above 216 MHz.

[7] *See* Section 76.609 of the Rules.

[8] Section 15.604 of the Rules limits the video output signal (measured RMS) of a TV interface device to 346.4 square root (R) microvolts. Section 15.608 of the Rules limits the video output signal (measured RMS) of a TV interface device on emissions removed more than 4.6 MHz below or 7.4 MHz above the video carrier frequency to 10.95 square root (R) microvolts. R is the rated output impedance of the TV interface device. It is typically 75 or 300 ohms.

[9] *See Report and Order* in Gen Docket 87-108, 2FCC Rcd 7231 (1987).

[10] *See Report and Order*, 2 FCC Rcd 7231 (1987), *See* also, *Memorandum, Opinion and Order*, FCC 88-208, adopted June 21, 1988.

[11] *See Report and Order* in Gen Docket 87-107, *supra*, at para. 12.

[12] The relaxation will apply as well to emissions appearing on frequencies removed by more than 4.6 MHz below or 7.4 MHz above the video carrier frequency.

[13] Cable-ready video cassette recorders are to continue to be subject to the provisions for general TV interface devices pending further action by the Commission in Dockets 87-107 and 87-389.

[14] *See Report and Order*, Gen Docket No. 83-10, FCC 84-21, released January 26, 1984 (49 Fed. Reg. 3991; February 1, 1984). *See* also Errata, Gen Docket No. 83-10, released March 2, 1984.

[15] *See* Oak petition for reconsideration, p. 6.

[16] *See Report and Order* in Gen Docket 83-10, *supra*, at paras. 9-10.

[17] *See* 47 CFR 76.617.

[18] Terminal devices used with a Master Antenna have operating characteristics which are similar to those of CSTDs. When we adopted standards for TV interface devices in 1983, we specifically indicated that TV interface devices attached to a Master Antenna were subject to the provisions of Part 15, Subpart H, of the Rules. The only difference between the technical requirements for these devices and CSTDs marketed under the provisions of Part 15, Subpart H, was the need to include a transfer switch. *See* Report and Order, Gen Docket 79-244, 93 FCC 2d 1068 (1983) at para. 18. Therefore, any changes in the basic technical requirements for CSTDs under Part 15, Subpart H, also apply to terminal devices used with a Master Antenna.

[19] Informal requests for clarification have been made by other parties. Cf. letter from FCC Technical Standards Branch to Alps Electronic Co., Ltd., dated November 6, 1987, ref 31030/EQU/4-2-6/5-5.

[20] By TV tuner sections, we mean both 1) the VHF tuner used to cover the 54-88 MHz and 174-216 MHz bands, to supply gain at the selected transmittercarrier frequency, to match the antenna and impedance, and to isolate the receiver local oscillator from the antenna, and 2) the UHF tuner used to cover the 470-890 MHz band, and that consists of input circuits for matching and selectivity and a local oscillator for providing an output at the intermediate frequency to be supplied to the VHF tuner.

[21] *See Notice of Proposed Rule Making*, Gen Docket 87-389, 2 FCC Rcd 6135 (1987).

[22] *See Report and Order* in Gen Docket 85-301, at para. 31.

[23] The rules adopted herein are derived from Part 15, Subpart H, as written prior to the issuance of the Order, as specified in the October 1986 edition of Title 47 of the Code of Federal Regulations (47CFR). It should be noted that the last edition of 47 CFR (October 1987) contains the rules which were adopted in the Order and subsquently stayed. *See Order Granting Stay*, FCC 87-323, adopted October 9, 1987.

[24] *See Report and Order*, Gen Docket 87-107, FCC 87-357, released November 20, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Annual Report Form M

ORDER

Adopted: October 26, 1988; Released: October 27, 1988

By the Chief, Common Carrier Bureau:

1. On September 9, 1988, the Chief, Common Carrier Bureau issued an *Order Inviting Comments* [1] on a proposed revision of the Federal Communications Commission Annual Report Form M. Interested parties were invited to file comments within 30 days of the release of the order, and reply comments within 45 days of the release. The State of New York Department of Public Service (NYDPS) filed, on October 12, 1988, a Motion for Permission to File Late-Filed Comments. On October 20, 1988, The United States Telephone Association (USTA) filed a Motion for Extension of Time to file reply comments.

2. NYDPS filed its comments on October 18, 1988. It states in its Motion that it could not comply with the deadline established in the *Order Inviting Comments* because it encountered a "serious delay" in obtaining a copy of that document, and because it needed the time to comply with internal review procedures. No opposition to NYDPS's motion was filed.

3. USTA requests that the deadline for filing reply comments be extended from October 27, 1988, to November 4, 1988. In support of its request, USTA states that certain administrative complications associated with the distribution of comments caused a delay in its receiving all of the comments filed. It claims that an extension is needed, therefore, to allow USTA and some of its members to obtain and review the comments, including any late-filed comments, and to prepare reply comments, if necessary.

4. Although NYDPS has not shown the type of reasons we normally rely on for grant of additional time for filing comments, we will grant its motion. This proceeding involves complex issues, and no party would be harmed by the modest request. After examining USTA's motion, we have determined that good cause has been shown for an extension of time for filing replies. This will allow all parties a full opportunity to address the extensive comments filed by NYDPS. Accordingly, we are granting USTA and all other interested parties an extension until **November 4, 1988,** to file replies.

5. Accordingly, IT IS ORDERED, pursuant to §§ 4(1), 4(j), 201-205, 215, 219, 220 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 215, 218, 219, 220 and 403 that NYDPS' Motion for Permission to File Late-Filed Comments is GRANTED, and that USTA's Motion for Extension of Time IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] DA 88-1218.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

BILL WELCH File No. 00547-CL-TC-1-88

For Commission Consent to Transfer
Control of the Florence, Alabama
Non-Wireline Cellular Permit to
McCaw Communications of Florence,
Inc.

MEMORANDUM OPINION AND ORDER ON REVIEW

Adopted: October 21, 1988; Released: November 14, 1988

By the Commission: Commissioner Dennis issuing a statement.

1. On January 19, 1988, Bill Welch (Welch) filed an application to transfer control of the Florence Cellular Telephone Company, Inc. (FCTC),[1] to McCaw Communications of Florence, Inc. FCTC was the holder of an authorization for an unbuilt facility in the Domestic Public Cellular Radio Telecommunications Service for the non-wireline frequencies to provide service in Florence, Alabama Metropolitan Statistical Area (MSA).

2. By order released April 19, 1988,[2] the Mobile Services Division (MSD) granted the Welch application. In granting the application, the MSD relied on its decision in *Corpus Christi Cellular Telephone Company*, [3] which held, *inter alia*, that the for-profit sale of a cellular authorization for unbuilt facilities is consistent with Sections 301 and 304 of the Communications Act of 1934, as amended (Act).[4] In addition, relying upon the Common Carrier Bureau's decision in *Madison Cellular Telephone Company*,[5] the MSD held that, despite the for-profit nature of the proposed transaction, the transferor had demonstrated that the authorization was not acquired with the intent to speculate in cellular licenses, as required by Section 22.40(b) of the Rules.[6]

3. Pursuant to Section 1.117 of the Rules,[7] we decided to review the *Bill Welch* decision to address the issue of whether the for-profit transfer of control or sale of a cellular authorization for unbuilt facilities is consistent with Sections 301 and 304 of the Act. We also sought comments from the public on this issue.[8] Fourteen parties, listed in Appendix A, filed comments.

COMMENTS

4. Most of the commenters argue that neither the plain language of Sections 301 and 304 of the Act nor their legislative history reflect any congressional intent to prohibit for-profit sales of construction authorizations.[9] Rather, Vanguard argues, for example, that Sections 301 and 304 were intended to limit the rights of grantees against the federal government, not vis-a-vis third parties.[10] In support of this statement, many commenters cite various portions of the legislative history of these sections. Vanguard states that in enacting the Radio Act of 1927,[11] Congress refused to limit the amount paid on a transfer of a license to the reasonable value of a stations's equipment and thus was not concerned with the amount of profit derived from transfers.[12] Telocator Network of America (Telocator) argues that Congress' intent in enacting Sections 301 and 304 was only to make clear that there was no ownership interest in a license so that if the FCC revoked a license, the courts could not find such revocation to be an unlawful taking of property without due process.[13] Several commenters argue that our previous interpretations of Sections 301 and 304 were incorrect.[14] McCaw notes that the theory of these previous interpretations is that allowing a profit recognizes a property interest in the spectrum, but that such interpretations fail to recognize that a grantee does not own the airwaves simply because its authorization has a market value.[15]

5. Next, McCaw argues, and several commenters concur, that not only are Sections 301 and 304 not proscriptive of for-profit sales of construction authorizations, but Sections 1, 4(i) and 310(d) of the Act give the Commission broad discretion to approve such transfers if they are found to be in the public interest.[16] Specifically, McCaw notes that Section 310(d) of the Act requires the Commission to determine that a proposed transfer is in the public interest.[17] McCaw also notes that this Commission has approved for-profit transfers of cellular authorizations in a variety of circumstances where it has determined that the public interest would be served, including trades of commensurate interests in cellular authorizations as well as sales of authorizations as part of the sale of a going concern.[18] Such sales, McCaw argues, were permitted notwithstanding the fact that the Commission has also promulgated trafficking rules in order to prevent speculation and to preserve the integrity of its licensing process.[19]

6. Finally, several commenters specifically argue that Section 22.40(b) of the Rules permits the for-profit transfer of a cellular construction authorization upon a showing that the transferor was not speculating in cellular licenses, and that the *Madison* policy provides a sound legal and policy analysis of this section of the Rules.[20] Carolina and Palmer argue that a proscription on for-profit transfers of authorizations is not an effective bar to the filing of speculative applications. However, they note, without the *Madison* policy, service will be delayed because speculators will either be forced to cancel their permits, which would make another lottery round necessary, or build minimally acceptable facilities, which could result in increased costs to serious operators who must rebuild the systems for effective use.[21]

7. The only opponent to interpreting Sections 301 and 304 as permitting the for-profit sale of an authorization for unbuilt facilities is Puerto Rico Telephone Company (PRTC). It argues that Sections 301 and 304 are "quite clear" that "a license to utilize frequencies is not a property right," and that the Commission has found that the "clear intent of Sections 301 and 304 of the statute is that a transferor should not profit from selling a construction permit."[22] PRTC also argues that the Bureau's decision in *Madison*, interpreting Section 22.40(b) of the Rules as permitting the for-profit sale of a construction authorization for unbuilt cellular facilities, is contrary to the public interest because 1) if an assignee pays a large sum for a construction authorization, the price of service to the public will increase; 2) permissive transfers will encourage

speculation; and 3) permitting such transfers will encourage more cellular applications to be filed, thereby delaying service to the public, contrary to the Commission's goal of expeditious service.[23]

8. The replies reiterate the arguments raised in the initial comments and specifically respond to the arguments raised by PRTC in its comments. Pactel argues that PRTC's claim that the costs of paying a large sum for the authorization will create higher rates is incorrect. It notes that the costs to a transferee associated with the debt incurred in purchasing the system at a profit are fixed costs. These costs are not the type of costs calculated in increasing service rates.[24] Pactel also notes that enforcement of the Commission's stricter application requirements will curtail speculation and reduce the number of applications more effectively than a ban on the for-profit sale of authorizations for unbuilt facilities.[25] Welch additionally argues that allowing for-profit transfers of cellular authorizations for unbuilt facilities will enhance consolidation of stand-alone systems, thus enabling nonwireline permittees to attain the economies of scale already attained by the wirelines. Such consolidation will also result in lower costs, more effective competition and an increased dedication to the provision of service.

DISCUSSION

9. We recognize, as PRTC maintains, that "prior Commission rulings have stated that any sale of a bare license or permit for profit is prohibited by Sections 301 and 304 of the Act." *Revision and Update of Part 22 of the Public Mobile Services Rules*, 95 FCC 2d 769, 800-801 n.31 (1983), *on reconsideration*, 101 FCC 2d 799 (1985), *on further* reconsideration, 2 FCC Rcd 1798 (1987). *Accord James F. Rill*, 60 RR 2d 583, 600-601, *on reconsideration*, FCC 86-520 (1986); *Instructional Television Fixed Service*, 94 FCC 2d 1203, 1261-62 (1983), *on reconsideration*, 98 FCC 2d 130 (1984). (Commissioner Rivera concurring in part, dissenting in part and issuing a statement). *Amendment of Section 73. 3597 of the Commission's Rules*, 52 RR 2d 1081, 1089 (1982), *on reconsideration*, 99 FCC 2d 971 (1985). The Commission's rationale for this interpretation has been stated as follows:

> Section 301 and 304 provide, *inter alia*, that licenses issued by the Commission convey no property interest. To allow a permit to be transferred in a situation in which the station seller obtains a profit, prior to the time that programs tests have commenced, would appear to violate this prohibition. The permittee would appear to have nothing to convey for profit other than the mere expectation of future profits, which appends to the permit itself.

Amendment of Section 73. 3597 of the Commission's Rules (Notice of Proposed Rule Making), 47 Fed. Reg. 985 (Jan. 8, 1982).

10. The Commission has previously indicated that it "may review [this] interpretation of the Act in the future . . ." *Revision and Update of Part 22*, 95 FCC 2d at 800-01 n.31. Having requested public comment on the proper interpretation of Sections 301 and 304, reviewed the comments, and conducted our own independent analysis and reexamination of the Act and its legislative history, we now conclude that these statutory provisions do not require us to prohibit the for-profit sale of "bare" Commission authorizations for unbuilt facilities.[26] Accordingly, for the reasons set forth below, we are changing our prior interpretation of Sections 301 and 304 and permitting such transactions in the cellular service.

11. Our analysis begins with the language of the statute. At the outset, the plain language of Sections 301 and 304 of the Act does not address the sale of authorizations for stations, whether built or unbuilt, for-profit or not for-profit. Rather, the language of these sections (quoted in n.4, *supra)* seems to address congressional concerns that the Federal Government retain ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees who are permitted to use the frequencies. The language does not bar the for-profit sale to a private party, subject to prior Commission approval, of whatever private rights[27] a permittee has in its license.[28]

12. The foregoing interpretation of Sections 301 and 304 is supported by the legislative history of the predecessor sections (Sections 1 and 5) of the Radio Act of 1927. Senator Dill, the Senate sponsor of the Radio Act and its "principal architect", *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 106 (1973), stated on the Senate floor that the predecessors to both Sections 301 and 304 "protect the public against any licensee securing vested rights under the provisions of this act." 68 Cong. Rec. 2869 (1927). More specifically, with respect to Section 301, Senator Dill, referring to this section as "a preamble or policy provision," said: "I do not think that, standing alone, would be controlling, but I do think it might serve to assist the court, in a case where a vested right was claimed, in determining what the intent of Congress was." *Id.* He then referred to the predecessor of Section 304 as a further restriction on a licensee's ability to claim vested rights in a frequency. *Id.* With respect to the portion of the predecessor of Section 301 that prohibits "ownership" of frequencies, Senator Dill again stressed the congressional intent of limiting a licensee's long-term rights vis-a-vis the Federal Government; nothing was said about restricting a licensee's ability to earn a profit on the value inherent in its authorization:[29] "What we have been talking about-- that nobody shall acquire the ownership of a radio channel for radio broadcasting, but he can only acquire a use for a limited period of time, as mentioned in the license." *Id.* at 2871.

13. Similarly, Secretary of Commerce Herbert Hoover, who was the prime Administration initiator of the Radio Act, made clear that the ownership restrictions related to a licensee's rights vis-a-vis the Federal Government, not its rights to make a profit from its authorization upon a transfer or assignment approved by the Commission: "[The legislation] retains complete control in the Federal Government of all channels of radio communications. It declares that there shall be no ownership or vested right in wave lengths . . . . [U]nder the provisions of this bill, there need be no fear that vested interest will ever override governmental control." *To Regulate Radio Communications : Hearings Before the Commission on Merchant Marine and Fisheries, U. S. House of Representatives*, 69th Cong., 1st Sess. 11 (1926).[30]

14. Although Sections 301 and 304 do not address transfers at all, Section 310(d) of the Act specifically deals with the assignment and transfer of authorizations between private parties. However, it contains no prohibition on for-profit transfer of construction permits. It provides, in pertinent part: "No construction permit or station license,

or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby." 47 U.S.C. §310(d). If there were a statutory limitation on the ability of a permittee to transfer its construction permit for profit, it would logically fit in this section of the Act. But Section 310(d) contains no such restriction. It requires that all transfers and assignments are simply to be judged by this Commission under the general public interest, convenience and necessity test. The fact that the Commission is required to undertake such review, and that no permit can be assigned or transferred prior to Commission approval, ensures that the Federal Government retains control over use of the spectrum, consistent with Sections 301 and 304.

15. Nor does the legislative history of the predecesor to Section 310(d) of the the Communications Act (Section 12 of the Radio Act) suggest any intent by Congress to limit the ability of a permittee (or licensee) to receive a profit for its authorization upon an assignment or transfer approved by the Commission. Indeed, the legislative history contains evidence that Congress considered, and rejected, such a prohibition. Specifically, the Senate version of Section 12 of the Radio Act contained a proviso that "the Commission shall not approve any transfer or assignment or disposition of the station license required hereby, voluntarily or involuntarily, if the consideration be greater than the reasonable value of the apparatus for which said license has been issued . . . ." *See* Warner at 547. The accompanying Senate report language said: "In order to prevent the selling of wave lengths for profit, the Commission shall not approve any transfer of wave length when the apparatus is sold for more than its reasonable value." S. Rep. No. 772, 69th Cong., 2d Sess. 4 (1926). This provision was rejected by the House and was not included in the final version of the statute.[31] "Under well-established rules of statutory construction, the passage of this bill in this compromise form is to be taken as a rejection by Congress of the Senate proposal that no assignment or transfer be approved if the consideration be greater than the reasonable value of the apparatus." Warner at 548.[32]

16. Accordingly, based on our analysis of the pertinent provisions of the Communications Act and its legislative history, we conclude that the Act does not bar the for-profit sales of construction authorizations for unbuilt facilities. Next, we proceed to consider whether we should allow the for-profit sale of construction authorizations for unbuilt facilities in the cellular service.

17. PRTC argues that the for-profit sale of construction permits for unbuilt cellular facilities is contrary to the public interest. It states that allowing for-profit transfers of construction authorizations for unbuilt facilities will lead to speculation. Such speculation, it argues, will cause delays in cellular service due to filing of a large number of applications by those with no intention of serving the public. In addition, PRTC states that permitting such sales will also increase the cost of cellular service because transferees who pay large sums for construction authorizations will recover the costs of the purchases from customers.

18. Turning to PRTC's specific arguments, we are not persuaded that allowing for-profit transfers of authorizations for unbuilt facilities will increase the price of services offered to the public. A cellular firm that gets a permit or license for nothing does not necessarily reduce the price of its service because of that fact. It is much more likely that the cellular company will price its service based on its estimated value, confirmed by the market price it can attain from its customers. The method of acquisition of the system itself does not change the amount of spectrum available, consumers' demand, the amount of time people spend in automobiles and other factors that make up the underlying supply and demand conditions that determine a market price. However, as recognized in the Bureau's *Madison* decision, a policy of permitting for-profit sales of authorizations for unbuilt facilities may reduce the costs of supply.

19. Moreover, many permittees in various proceedings have stated that it is not economically feasible to operate their originally proposed stand-alone systems because they cannot attain the economies of scale achievable by operating wide-area systems.[33] If a grantee can not profit from a sale, it will have no incentive to transfer the authorization. Forced to construct the facility before transfer, the grantee will likely construct minimally acceptable facilities. "The costs, perhaps significant, that would be incurred by the larger carrier to integrate two stand-alone systems built for different purposes (which may even include complete replacement of a technically incompatible cellular system) would be avoided by simply permitting the sale of a construction authorization at a profit prior to construction."[34] Thus, allowing for-profit sales of unbuilt authorizations is likely to reduce costs to the public because carriers operating wide-area systems will be able to operate the systems more efficiently, without having to rebuild incompatible systems, which in turn will allow them to compete better.[35]

20. While allowing for-profit sales does create the possibility that there will be some speculation, we do not believe that restricting for-profit transfers of authorizations for unbuilt facilities is the most efficient or effective way to discourage such speculation. Rather, we believe that discouraging speculation can be accomplished by reviewing all the qualifications of each applicant at the tentative selectee stage and by evaluating all assignment and transfer requests pursuant to the anti-trafficking provisions of Section 22.40(b).[36] Thus, in those markets subject to future cellular lotteries, we have tightened the financial qualifications requirements,[37] barred an applicant from having any interest in more than one cellular application in a given market,[38] and prohibited non-wireline applicants from entering into pre-grant settlement agreements.[39] These measures should greatly reduce the danger of speculation.

21. In addition, pursuant to Section 22.40(b), we will continue to review rigorously any evidence indicating speculative intent and to withhold approval where there is a likelihood of speculation.[40] We will continue to require affidavits accompanying transfer applications to make the Section 22.40(b) showing.

22. Finally, PRTC argues that the *Madison* policy encourages more applications to be filed, which delays service to the public. Given the huge numbers of applications filed before *Madison*, it seems unlikely that this policy will have any significant impact on potential applicants. Furthermore, as indicated above, we have taken additional steps to discourage the filing of speculative applications under our new, stricter cellular application standards. Ultimately, the *Madison* policy should ensure higher quality, lower cost service to the public.

23. Having concluded that for-profit sales of unbuilt authorizations are lawful under the Act and will serve the public interest in the cellular service, we must now evaluate this transfer application under the requirements of Section 22.40 of the Rules. The affidavit submitted by the transferor indicated that the transferor acquired the construction authorization for the purpose of constructing and operating the system, and that its decision to sell was prompted by changing business conditions and its determination that it would not be economical to build the system on a stand-alone basis.[41] Based on this undisputed information, we conclude that the original application was not filed for speculative purposes and the transfer is permitted by Section 22.40.

24. In this case, the Bureau found that Welch had made the requisite Section 22.40 showing that he was not speculating in cellular licenses. For all of the reasons stated above, we conclude that the for-profit sale of cellular authorizations for unbuilt facilities is consistent with the Act. We further conclude that for-profit transfers of such authorizations will serve the public interest and advance our long-term goal of providing rapid and efficient service to the public. Thus, we find that grant of the application for transfer of control from Welch to McCaw is proper.

25. Accordingly, IT IS ORDERED THAT review is GRANTED to the extent set forth herein.

26. IT IS FURTHER ORDERED THAT grant of the above-captioned application is AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Welch was a majority stockholder of FCTC.

[2] *Bill Welch*, 3 FCC Rcd. 2234 (Mob. Ser. Div., 1988) (*Bill Welch*).

[3] 3 FCC Rcd. 1889 (Mob. Ser. Div., 1988).

[4] Section 301 provides, in pertinent part, that it is the purpose of the Act "to provide for the use of [radio transmission] channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and period of the license." 47 U.S.C. §301. Section 304 of the Act requires applicants to "waive any claims to the use of any particular frequency . . . as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." 47 U.S.C. §304.

[5] 2 FCC Rcd. 5397 (Com. Car. Bur. 1987) (*Madison*).

[6] *Id.* Section 22.40(b) reads as follows: "Cellular systems: The sale of a cellular construction permit will only be permitted after a showing that the transferor is not speculating in cellular licenses. The burden of proof is on the transferor. *See* also [Section] 22.920." 47 C.F.R. §22.40(b). Section 22.920(b) provides exceptions to this requirement for constructed cellular stations where the authorization was obtained by lottery and for trades of "commensurate" interests in cellular authorizations.

[7] 47 C.F.R. §1.117.

[8] *Bill Welch*, 3 FCC Rcd. 3158 (1988) (*Order*).

[9] *See e.g.* Comments of Vanguard Cellular Systems, Inc. (Vanguard), McCaw Cellular Communications, Inc. (McCaw), Carolina Metronet, Inc. (Carolina), Palmer Communications, Inc. (Palmer), Pactel Cellular (Pactel), and Centel Cellular Company (Centel).

[10] *See* Comments of Vanguard at 8.

[11] Sections 301 and 304 of the Act were previously Sections 1 and 5 of the Radio Act of 1927.

[12] *Id* at 14.

[13] *See* Comments of Telocator at 2, n. 4.

[14] *See e. g.*, Comments of McCaw, Centel and Telocator.

[15] *See* Comments of McCaw at 19.

[16] *See* Comments of McCaw at 20.

[17] *Id.* at 22.

[18] *Id.* at 30.

[19] *Id.* at 25.

[20] *See e. g.*, Comments of Carolina, Palmer, McCaw, and Cellular Holdings, Inc.

[21] *See* Comments of Carolina at 8-9 and Palmer at 8.

[22] Comments of PRTC at 4.

[23] *Id.* at 6-7.

[24] *See* Reply Comments of Pactel at 3-4.

[25] *Id.* at 4-5.

[26] We emphasize that our decision herein on statutory grounds does not in any way affect continued enforcement of the Commission policies reflected in the cellular radio anti-traffickingrule, 47 C.F.R. §22.40(b), or rules in other services that bar the for-profit sale of construction permits. *See , e. g.*, 47 C.F.R. §73.3597.

[27] It is important to note that the fact that Section 301 provides that licensees may have no "ownership" interests in frequencies does not mean that they have no rights in the license itself:

> While a station license does not under the Act confer an unlimited or indefeasible property right [citation omitted] -- the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest -- nevertheless the right under a license for a definite term to conduct a broadcasting business requiring -- as it does -- substantial investment is more than a mere privilege. A broadcasting license is a thing of value to the person to whom it is issued. [P]rovisions of the CommunicationsAct itself . . . recognize that a broadcasting license confers a private right, although a limited and defeasible one.

L. B. Wilson, Inc. v. FCC, 170 F. 2d 793, 798 (D.C. Cir. 1948) (citing, *inter alia*, Section 301).

[28] The distinction between rights between private parties and the Commission and rights between only private parties is a critical one: "The jural relationships that attach from the relationship between transferor and transferee must be distinguished and differentiated from those in relationship to the regulatory authority. There is a qualitative difference in the rights and obligations which an assignor asserts against an assignee as compared to the assertion of rights by transferor and transferee against the Commission's regulatory powers." H. Warner, Radio and Television Law at 828 (1948) (hereinafter Warner).

[29] Congress understood that Commission authorizations would be a thing of value. As the Solicitor of the Department of Commerce testified in support of the legislation: "I have no doubt that the broadcasting privilege is going to be of very considerable value, the same as any other franchise becomes of value." *Radio*

Control : Hearings Before the Comm. on Interstate Commerce, U. S. Senate, 69th Cong., 1st Sess. 45-48 (1926) (cited in Warner at 551 n. 33).

[30] As one commentator has noted, Sections 301 and 304 of the Act are "intimately related." Warner at 539. As suggested by the plain meaning of their language, these sections constitute "assurances of federal control," not restrictions on the sale of bare authorizations. *See id.* at 544. The "underlying objective" of these provisions was simply "that no proprietary interests in a license or frequency can be asserted against the regulatory processes of the United States." *Id.* Their enactment is "directly traceable" to "the gravest fears . . . expressed by legislators, and those generally charged with the administration of communications during the period which marked the development of commercial broadcasting, that government regulation of an effective sort might be permanently prevented through the accrual of property rights in licenses or means of access, and that thus franchises of the value of millions of dollars might be established for all time." *Id.* at 540.

[31] As one Commissioner stated, the legislative history contains "persuasive evidence" that Congress "thoroughly considered" the "bare bones" theory by which such a profit would be prohibited, and, "after careful deliberation decided not to authorize or direct the Commission to apply it." *Travelers Broadcasting Service Corp.*, 6 FCC 456, 471 n.1 (1938) (Commissioner Craven dissenting), *on reconsideration*, 7 FCC 504 (1939). *See also Crowder v. FCC*, 399 F.2d 569, 573 n. 25 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). (Congress refused to limit the price of transfers to the reasonable value of the station's equipment).

[32] This interpretation of the statute was supported by at least one Commissioner shortly after passage of the Communications Act. In rejecting an interpretation of Sections 301 and 304 adopted by the Commission that was similar to that which we revisit here (in the context of license, rather that construction permit, assignment), Commissioner Craven stated:

> The viewpoint underlying this theory seems to be that if the Commission approves a transfer involving a price more than the value of the tangible assets, it is in effect allowing a wave length or license or some other interest in a station to be sold. Of course, there is nothing in Section 310(b) which forbids this: the section simply states that a transfer, in order to be valid, must be in the public interest and must have the approval of the Commission. The proponents of this theory, however, go back to Section 301 and, as I understand, they say that to approve such a price is tantamount to recognition of a right of ownership in a wave length or license beyond the terms of the license itself. *I have not heard anyone explain, however, just how an assignee or transferee gets any right of ownership by paying a sum larger than the value of the physical assets and by getting Commission approval of* the transaction. He still must come before the Commission for periodical renewals of his license; must expressly waive any such claim in every application for renewal; and must accept a license, which, on its face, says he has no right of ownership, just as does the statute itself. (Emphasis added)

Travelers Broadcasting Service Corp., 6 FCC at 471-72 (Commissioner Craven, dissenting).

[33] Madison, 2 FCC Rcd 5397. Specifically, the utilization of the same MTSO, marketing and personnel in both markets actually reduces "costs dramatically (since the expense of serving the additional MSAs is incremental) while reaping the benefits of operating an integrated system serving a much broader area." Id.

[34] Id.

[35] Telocator notes in its comments that in rural areas, efficiencies from operating with neighboring larger systems are more pronounced because many areas are a collection of adjacent counties. Unlike MSAs they lack social and commercial cohesiveness and therefore are more likely to have service earlier if consolidated. See also Amendment of the Commission's Rules for Rural Services Areas, Fourth Notice of Proposed Rule Making, FCC 88-157, released June 30, 1988, at para. 9. We note that our decision herein applies to applications for transfer of cellular authorizations for unbuilt facilities in the rural service areas (RSAs) as well as MSAs.

[36] We have already recognized that speculation should be checked at the application stage, noting that the benefits of "requiring firm financial commitments at the application stage include a reduction in the number of speculative applicants." See Amendment of the Commission's Rules for Rural Cellular Service, Fourth Report and Order, FCC 88-154, adopted April 21, 1988; released May 18, 1988 at para. 19.

[37] 47 C.F.R. §22.921(b)(1).

[38] Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order, FCC 88-155, released May 18, 1988 at paras. 22-24.

[39] *Id.* at paras. 3, 29 and 30.

[40] *See e.g.*, Theodore M. Jones, et al., Hearing Designation Order and Order to Show Cause, DA 88-808, released May 31, 1988.

[41] 3 FCC Rcd. 2235 n. 1.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

IN WHICH COMMISSIONER JAMES H. QUELLO JOINS

In Re: Application of Bill Welch For Commission Consent to Transfer Control of the Florence, Alabama Non-Wireline Cellular Permit to McCaw Communications of Florence, Inc.

My support for this item is premised on the particular circumstances of the cellular industry at this point in time. Because extensive construction has already been completed in the larger markets, this ruling will generally affect only those smaller cellular markets now under construction or awaiting Commission selection of a permittee.

In smaller cellular markets, this ruling should ultimately benefit the public by speeding the availability of cellular service. It will undoubtedly facilitate the fusion of these smaller markets with adjacent existing cellular facilities when the permittee finds it uneconomic to operate a stand-alone system. The economics of smaller markets dictate that expanding an existing system to include an adjacent unbuilt market may, in many cases, provide service more efficiently and quickly. Only because of *these* particular circumstances in *this* particular industry do I accept the for-profit sale of construction permits as being in the public interest.

No one should interpret this common carrier decision as a percedent for allowing the sale of a construction permit for profit in the broadcasting industry.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-475

In the Matter of

Amendment of Section 73.202(b),	RM-5905
Table of Allotments,	RM-6209
FM Broadcast Stations.	
(Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1988; Released: November 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of KCMA, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6687 (1987), proposing the substitution of Channel 221C2 for Channel 221A at Broken Arrow and the modification of its license for Station KCMA(FM) to specify the higher powered channel. In addition, Midwest Broadcasting Co. (Midwest) was requested to respond to the *Order to Show Cause* as to why its license for Station KQQF(FM) should not be modified to specify operation on Channel 255A in lieu of its present Channel 221A at Coffeyville, Kansas. Comments and reply comments were filed by the petitioner, Midwest, Demaree Media, Inc. (Demaree), licensee of Station KKEG(FM), Fayetteville, Arkansas, and KOTV, Inc. (KOTV), licensee of Television Station KOTV, Channel 6, Tulsa, Oklahoma. Counterproposals were filed by Midwest requesting the substitution of Channel 287C2 for Channel 221A at Broken Arrow and the substitution of Channel 221A for Channel 287A at Bixby, Oklahoma, and by Demaree requesting the substitution of Channel 221C2 for Channel 221A at Fayetteville, Arkansas, the modification of its license to specify the higher powered channel, and the substitution of Channel 268A for Channel 221A at Booneville, Arkansas.[2]

2. As stated in the *Notice*, adoption of the petitioner's proposal would result in the overlap of Channel 221C2's 1 mV/m contour and the Grade B contour of Station KOTV(TV), Channel 6, Tulsa, Oklahoma. The Commission has expressed concern over the continued availability of noncommercial service in areas where there is a Channel 6 television station. Recognizing the special burden which the Commission imposed on Channel 221 licensees seeking upgrades in these markets, petitioner provided a study showing that no additional noncommercial stations could be accommodated at Broken Arrow. However, the *Notice* stated that our concern over the availabilty of noncommercial channels was not limited solely to the community of license. *See, First Report and Order*, MM Docket 86-144, 2 FCC Rcd 660 (1987). A staff analysis found that Channel 221C2 at Broken Arrow would not create any new preclusion on Channels 218 through 220C2 as they were already precluded by the existence of TV Channel 6 at Tulsa. However, the staff found that some preclusion could occur on the use of Channels 220C and C1. Therefore, petitioner was requested in the *Notice* to furnish a study showing the preclusive effect on the future allotment of these channels if Station KCMA(FM) were upgraded to Channel 221C2.

3. In response, petitioner states that no area would be affected if Channel 221C2 is allotted to Broken Arrow. According to petitioner, use of Channel 220 is already precluded by Stations KOSU(FM), Channel 219C, Stillwater, Oklahoma, KHIB(FM), Channel 220A, Durant, Oklahoma, Channel 223A, unoccupied but applied for, Heavener, Oklahoma, KUAF(FM), Channel 217C, Fayetteville, Arkansas, KSYN(FM), Channel 223C1, Joplin, Missouri, and Channel 220A, unoccupied but applied for, Arkansas City, Kansas. In fact, petitioner submits that the existence of these stations precludes the use of Channel 220 at Broken Arrow even if Station KCMA(FM) remains a Class A. In addition, petitioner states that the area is already well served by noncommercial stations since there are four such stations which are capable of being received in Broken Arrow. In conclusion, petitioner reiterates its intention to apply for Channel 221C2, if allotted to Broken Arrow, and also to reimburse Station KQQF(FM) at Coffeyville for all reasonable expenses associated with its change of channel.

4. Midwest opposes the modification of its license for Station KQQF(FM), stating that it will suffer economic injury by the loss of its position on the dial and that this loss is not fully reimbursable under the Commission's guidelines. In addition, it advances the same counterproposal as discussed in the *Notice*, that is, the substitution of Channel 221A for Channel 287A at Bixby, Oklahoma, which was allotted in MM Docket 84-231, and the substitution of Channel 287C2 for Channel 221A at Broken Arrow. Midwest's comments in opposition to the modification of its license as well as its support for the substitution of channels at Bixby were detailed in the *Notice* and Midwest has presented no new arguments. Therefore, that portion of its comments and counterproposal need not be restated here. However, Midwest additionally now contends that petitioner's proposal should be denied for technical reasons. Midwest states that the petitioner must relocate Station KCMA's transmitter to an area near Jones Airport in order to avoid a short-spacing to two stations. It argues that petitioner will have difficulty in locating a site which will meet the spacing requirements and also not pose a hazard to air navigation. It goes on to state that locating Station KCMA's transmitter further south "would limit the city grade signal to Tulsa and Broken Arrow." In addition, it questions the willingness of petitioner to relocate to a non-short-spaced site in light of its recent application requesting a new site which will not be usable if Channel 221C2 is allotted to Broken Arrow. Midwest submits that it has raised substantial and material questions of fact which warrant a hearing before its license is modified, specifically, the impact of Channel 221C2 on use of the noncommercial band, the extent of reimbursement to Station KQQF(FM), the need of the Tulsa-Broken Arrow area to receive another FM signal, whether this need "counterbalances the legitimate interests" of Station KQQF, and, finally, whether the allotment of Channel 221C2 to Broken Arrow can be accomplished without creating a short-spacing or air hazard. Demaree supports

Midwest's counterproposal since the allotment of Channel 287C2 at Broken Arrow would not conflict with its desire to upgrade its station at Fayetteville and would have no detrimental impact on either noncommercial educational operations in the Tulsa-Broken Arrow area or on TV Channel 6 Station KOTV.

5. KOTV argues that proponents seeking upgrades on Channel 221 which would affect Channel 6 stations bear a heavy burden of showing that their proposal would serve the public interest. It contends that this allotment would not serve the public interest since it would cause substantial interference to Station KOTV's present operation. KOTV recognizes that the Commission has no specific standards for estimating interference to a TV Channel 6 station from a Channel 221 station. However, based on an extrapolation of the protection ratio curves contained in Figure 2 of Section 73.599 of the Commission's Rules, it states that interference to its Channel 6 operation would be expected to occur within the 103 dBu contour of an upgraded Station KCMA. Assuming maximum Class C2 facilities, KOTV states that the 103 dBu contour would extend approximately 5 kilometers but that the Commission's rules require the satisfaction of such complaints only within the 115 dBu contour, or to a distance in this case of only approximately 2.7 kilometers. Therefore, it concludes that this new interference mandates the denial of petitioner's proposal. KOTV states that the Commission has previously recognized the significance of Channel 6 interference in allotment proceedings, citing *Clinton and Bald Knob, Arkansas*, 49 RR 2d 926 (1981). In addition, KOTV contends that the Commission recognized in the *Notice* that the allotment of Channel 221C2 at Broken Arrow would have a substantial preclusionary impact on noncommercial educational operations in the Tulsa market and that given this impact it is not possible for the proposal to be found consistent with the public interest.

6. In reply comments, Midwest faults the preclusion study submitted by petitioner. It contends that its study, unlike petitioner's, shows that an area of 2,405.4 square kilometers will be precluded from use of Channel 220C1 and that an area of 1,455.9 square kilometers will be precluded from use of Channel 220C. Midwest also supports KOTV's opposition, stating that the station has a legitimate right to protect its service area from detrimental interference.

7. Petitioner, in response, points out that the protection ratio curves in Section 73.599 upon which KOTV bases its interference allegations apply only to stations within the noncommercial educational FM band and thus do not apply to Station KCMA, which operates on a commercial channel. Further, it disputes KOTV's claim that the Commission has in the past stated concern over interference caused to a TV Channel 6 station from stations operating on Channel 221A. Petitioner submits that in each instance in the past decade where the Commission has looked at the problem of TV Channel 6 interference, the concern has been limited to potential interference from stations operating within the noncommercial band only, citing *Noncommercial Educational FM Stations, First Report and Order*, 43 RR 2d 197 (1978), *Noncommercial Educational FM Stations, Second Report and Order*, 44 RR 2d 235 (1978), and *Noncommercial Educational FM Stations, Third Report and Order*, 57 RR 2d 106 (1984). Thus, it concludes that KOTV's objection to the allotment of Channel 221C2 to Broken Arrow based on interference to its Channel 6 operation is inappropriate.

8. Petitioner also disputes the claims of Demaree, KOTV and Midwest that the allotment of Channel 221C2 at Broken Arrow would substantially impact noncommercial educational service in the area. Using the preclusive effect chart in paragraph 4 of the *Notice*, petitioner states that it has determined that any possible preclusion is limited to a narrow ring surrounding Broken Arrow. However, according to its engineering report, use of Channel 220C within this area is already precluded by Stations KOSU, Channel 219, Stillwater, Oklahoma, KKNG, Channel 223, Oklahoma City, Oklahoma, KNGM, Channel 220, Emporia, Kansas, KSYN, Channel 223, Joplin, Missouri, KHIB, Channel 220, Durant, Oklahoma, and a new station on Channel 220 at Russellville, Arkansas, for which a construction permit has been issued. Likewise, use of Channel 220C1 is precluded by the Stillwater, Oklahoma City, Durant and Emporia stations which preclude Channel 220C. In addition, petitioner goes on to state that while these stations preclude the initiation of new operations, these same stations are not necessarily precluded from increasing their own facilities. Finally, petitioner notes that no existing or potential noncommercial educational broadcasters commented in this proceeding.

9. Petitioner contends that Midwest's counterproposal is, in reality, a petition for reconsideration of the denial in the *Notice* of its petition for rule making. According to petitioner, the Commission rejected its earlier request based on a finding that Midwest had failed to present a compelling need for the substitution of Channel 287A at Bixby, Oklahoma, which was allotted in MM Docket 84-231. It also states that Midwest's opposition to the allotment of Channel 221C2 contains numerous inaccuracies. First, contrary to Midwest's assumption, petitioner does not propose to upgrade Station KCMA at either its licensed site or the site specified in the recently granted construction permit. Rather, it intends to relocate to a new site which meets the spacing requirements to all licensed facilities and pending applications. Petitioner states that it must vacate its present transmitter site in the near future and has obtained the outstanding construction permit for use in the event that it must relocate prior to the grant of its petition.

10. Petitioner also argues that Midwest has not presented any reason why Station KQQF(FM) should not be modified to Channel 255A. According to petitioner, Midwest cannot present any precedent for the proposition that the public interest requires or permits a station to retain a vested right in its present channel. Petitioner points out that involuntary channel changes are routine in FM rule making proceedings. It goes on to state that the Commission's relinquishment of jurisdiction over call sign disputes demonstrates that the Commission no longer requires nor enforces a licensee's right to preserve the promotional value of its facilities. It reiterates its intention to reimburse Midwest for all expenses traditionally permitted by the Commission but argues that Midwest has presented no basis for the imposition of a more onerous burden.

11. KOTV, in further comments, reiterates its arguments concerning the interference to its station from an upgraded Station KCMA. It appears to agree with the petitioner that the cases which it cited in support of Channel 6 interference concerns do not apply to Channel 221 operations. However, it argues that these cases were decided at a time when only Class A operations were permitted on Channel 221. Now that the rules permit higher powered usage, KOTV contends that the public interest in

interference-free service requires that such potential interference be evaluated in rule making proceedings. KOTV submits that to assert that such an evaluation is unnecessary because of the commercial nature of the station is to ignore technical realities. Therefore, it urges that the potential for interference be considered regardless of the commercial or noncommercial status of the station. It also states that petitioner has misconstrued the extent of anticipated interference. Such interference could occur within 5 kilometers of Station KCMA's transmitter, not just at that distance. Therefore, it urges denial of petitioner's request, especially since Midwest has presented a proposal which would not involve degradation of Station KOTV's signal.

DISCUSSION

12. Based on a thorough review of the pleadings before us, we find that the public interest would be served by substituting Channel 221C2 for Channel 221A at Broken Arrow since it could provide the community with expanded radio service without any significant impact on existing or future noncommercial service in the area. We note that Midwest and petitioner disagree on the impact of the allotment on noncommercial educational service. Midwest claims preclusion over an area of 2,405.4 square kilometers for Channel 220C1 and 1,455.9 square kilometers for Channel 220C, while petitioner claims that existing stations already preclude the addition of new noncommercial educational operations in the area. While petitioner submitted its preclusion study in its reply comments and thus did not provide us the benefit of responsive comments addressing it, we have reviewed its study and discovered no significant errors. On the other hand, the Midwest preclusion study, also submitted in reply comments, does not include sufficient details to permit a thorough review. However, it does appear that at least the KOSU(FM) preclusion circles on the Midwest preclusion maps are too small. Thus, if there is any new preclusion, it is much less than Midwest claims. Accordingly, we conclude that there would be no significant impact on the future inauguration of new noncommercial educational service in the area. We also note that no party has disputed petitioner's claim that the allotment at Broken Arrow may not preclude existing noncommercial educational stations from upgrading their facilities. In fact, no existing or potential noncommercial entities filed comments in response to the proposed upgrade at Broken Arrow.

13. We also find that Midwest has failed to present any evidence which would alter the Commission's earlier determination that its counterproposal has failed to meet the "compelling need" standard for the substitution of channels allotted in MM Docket 84-231. *See Notice*, fn. 1. With regard to the substitution of Docket 84-231 allotments, the Commission stated that these channels would not be subject to substitution absent a showing of compelling need or Commission error. We went on to state that the upgrading of an existing station did not meet the compelling need standard. *See Memorandum Opinion and Order*, 50 FR 47391, November 18, 1985, and *Shallotte, North Carolina*, 2 FCC Rcd 7085 (1987). In clarifying this position, the Commission stated that consideration would be given to requests seeking the substitution of these channels after the application filing window had closed if the petitioner shows that the substitute channel meets the spacing requirements to each site specified in the applications on file on the date the petition is submitted, assuming all other separation requirements are also met. *See Memorandum Opinion and Order*, 51 FR 36401, October 10, 1986. Channel 287A at Bixby was in the 64th group of allotments opened for application. Because Midwest's proposal was filed before the filing window for Channel 287A at Bixby was opened, it is not appropriate to consider its substitution for the purpose of upgrading Station KCMA at Broken Arrow.

14. We also find that KOTV's opposition does not warrant denial of the allotment of Channel 221C2 to Broken Arrow. The Commission's Rules provide no interference protection to TV Channel 6 stations from stations operating within the commercial band beyond that specified in Section 73.318. Section 73.318, FM Blanketing Interference, states that areas adjacent to the transmitting antenna that receive a signal of 115 dBu or greater are assumed to be blanketed and provides that new permittees must satisfy all complaints of blanketing interference which are received during a one year period. KCMA, like all other stations, is expected to comply with this requirement. It appears that KOTV has misinterpreted the Commission's concern in upgrading stations operating on Channel 221. The Commission's concern does not focus on any interference which may be caused to the TV Channel 6 station but rather on the compression of noncommercial channels available for use in those markets where there is a Channel 6 operation. As the Commission stated:

> In particular, the Commission is concerned about potential upgrades on Channel 221 in markets where there exists a TV Channel 6 operation. In such circumstances, the existence of the television operation effectively reduces the spectrum available for public broadcast operations at the lower portion of the NCE band, and allowing upgrades on Channel 221 would further exacerbate the problem by constricting potential public broadcast operations at the upper portion.

2 FCC Rcd 660 (1987). As concerns interference to TV Channel 6 operations by stations operating on Channel 221, the Commission recently stated:

> The Commission acknowledges that FM stations on Channel 220 must consider its effect on Chanel 6 television stations while those seeking to operate on Channel 221 do not. We find that the argument by Family Stations and others about extending the power restrictions to the commercial band to be outside the scope of this proceeding. There is nothing in the record convincing us to extend such restrictions to the commercial band or to arbitrarily alter the prediction criteria.

Memorandum Opinion and Order, Docket 20735, 50 FR 27954, July 9, 1985. KOTV argues that the Commission has not considered the impact of stations operating on Channel 221 since their Class A limitation was removed. However, KOTV has submitted no evidence that its circumstances are different from TV Channel 6/commercial FM situations in general or that there is sufficient interference potential to warrant a general rule making considering protection criteria. Accordingly, we find that this issue is outside the scope of this proceeding.

15. Finally, we find that Midwest has not presented a substantial and material question of fact which would warrant a hearing on the modification of its license for Station KQQF(FM) to specify operation on Channel 255A in lieu of its present Channel 221A. Midwest claims that a hearing must be held to determine the technical feasibility of the allotment, its impact on noncommercial stations in the area, the extent of reimbursement to Station KQQF(FM), and whether the need of the Tulsa-Broken Arrow area to receive another FM signal "counterbalances the legitimate interests" of Station KQQF(FM).

16. Petitioner states that it will specify a transmitter site for Channel 221C2 at Broken Arrow which fully complies with the Commission's spacing requirements. Midwest has presented no data showing that a site complying with both the spacing and air hazard requirements is not available. Rather, it merely states that the petitioner may encounter difficulties due to the proximity of Jones Airport. It appears to admit that sites further south of the community could be used, even though they may "limit" Station KCMA's city-grade signal over Tulsa and Broken Arrow. However, it makes no showing that petitioner cannot comply with the Commission's requirement that a 70 dBu signal be placed over all of Broken Arrow, its community of license. As to the effect of Channel 221C2 at Broken Arrow on noncommercial operations in the area, we have determined that the allotment would have no significant impact on either existing or future allotments. *See* paragraph 12, *supra*.

17. We also find that no hearing is warranted to determine the extent of reimbursement for Station KQQF(FM). Petitioner has stated that it will reimburse Midwest for the reasonable expenses involved in Station KQQF(FM)'s change of channel. Reimbursement of expenses is governed by the guidelines set forth in *Circleville, Ohio*, 8 FCC 2d 159 (1967). It is expected that petitioner and Midwest will negotiate in good faith as to the extent of reimbursement to which Midwest is entitled. However, should they be unable to agree, they may seek further Commission assistance. *See Mayville and Wickliffe, Kentucky, et al.*, 48 RR 2d 1232 (1981). As to Midwest's "legitimate interests" in use of Channel 221A at Coffeyville, the Commission has held on numerous occasions that the substitution of an existing station's channel at one community served the public interest where the substitution permitted the provision of a new or expanded service at another community. *See, e.g., Marietta, Ohio, and Ravenswood, WV*, 2 FCC Rcd 4681 (1987), *Albany, NY et al.*, 2 FCC Rcd 4300 (1987), 3 FCC Rcd 4681 (1987), and *Mayville and Wickliffe, KY, et al., supra*.

18. Channel 221C2 can be allotted to Broken Arrow in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.7 kilometers (12.4 miles) west to avoid a short-spacing to Station KKEG, Channel 221A, Fayetteville, Arkansas. Channel 255A can be allotted to Coffeyville, Kansas, in compliance with the Commission's minimum distance separation requirements and can be used at Station KQQF(FM)'s present transmitter site. [3] As proposed, we shall also modify petitioner's license for Station KCMA, Broken Arrow, to specify Channel 221C2 and Midwest's license for Station KQQF(FM), Coffeyville, Kansas, to specify operation on Channel 255A.

19. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Coffeyville, Kansas	255A
Broken Arrow, Oklahoma	221C2

20. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KCMA, Inc. for Station KCMA(FM), Broken Arrow, Oklahoma, IS MODIFIED effective **December 22, 1988,** to specify operation on Channel 221C2, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

21. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Midwest Broadcasting Company, Inc. for Station KQQF(FM), Coffeyville, Kansas, IS MODIFIED effective **December 22, 1988,** to specify operation on Channel 255A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KQQF(FM)'s license, BLH-830902AI, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-830902AI, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

22. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows:

Midwest Broadcasting Company, Inc.
P.O. Box 1087
Coffeyville, Kansas 67337

John A. Borsari, Esq.
John Borsari & Associates
P.O. Box 19205
Washington, D.C. 20036
(Counsel to Midwest Broadcasting)

23. IT IS FURTHER ORDERED, That the counterproposal filed by Midwest Broadcasting Company, Inc. to substitute Channel 287C2 for Channel 221A at Broken Arrow, Oklahoma, and substitute Channel 221A for Channel 287A at Bixby, Oklahoma, IS DENIED.

24. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

25. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Bixby, Oklahoma, has been added to the caption.

[2] Public Notice of Midwest's counterproposal was given on January 8, 1988, Report No. 1705. Demaree's counterproposal is not acceptable for consideration and thus was not placed on public notice. A staff review of the proposal shows that Channel 221C2 at Fayetteville would require a site restriction of 36.9 kilometers in order to meet the distance separation requirements to Station KHPQ, Channel 221A, Clinton, Arkansas, and to Station KCMA at Broken Arrow with its present Class A facilities. However, this distance is too far for a Class C2 station to provide the required 70 dBu service to its community of license. Counterproposals must be technically correct at the time of their filing so that all parties are afforded an opportunity to respond in reply comments. Therefore, we shall not accept Demaree's Supplemental Comments which attempts to correct the deficiencies in its counterproposal.

[3] The coordinates for Channel 221C2 at Broken Arrow are North Latitude 36-03-37 and West Longitude 96-00-57. The coordinates for Channel 255A at Coffeyville are North Latitude 37-06-28 and West Longitude 95-43-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-520

In the Matter of

Amendment of Section 73.202(b),	RM-6516
Table of Allotments,	
FM Broadcast Stations.	
(Woodstock and Broadway, Virginia)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 11, 1988; Released: November 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Ruarch Associates (petitioner), permittee of FM Station WAZR, Channel 240A, Woodstock, Virginia, seeking the substitution of Channel 241B1 for Channel 240A at Woodstock, Virginia, and modification of the license of Station WAZR(FM) to specify operation on the new channel.[1] In order to accomplish this substitution petitioner suggested the substitution of Channel 226A for Channel 238A at Broadway, Virginia, which is currently occupied by Station WLTK(FM).[2] Petitioner submitted information in support of its proposal and states an intention to construct the higher class facilities, if authorized.

2. A staff engineering analysis reveals that the proposed substitution at Woodstock can be made in compliance with the Commission's minimum separation requirements with the imposition of a site restriction 23.4 kilometers (14.5 miles) southwest of the city. [3] The restriction is necessary to avoid short spacings to Station WHUR-FM, Channel 242B, Washington, D. C., and Station WHTX(FM), Channel 241B, Pittsburgh, Pennsylvania. In addition, Channel 226A must be substituted for Channel 238A at Broadway in order to accomplish the Woodstock substitution. Therefore, we are herein issuing a *Show Cause Order* to Massanutten Broadcasting Co., Inc., permittee of Station WLTK(FM) at Broadway seeking comments as to why its permit should not be modified to specify operation on Channel 226A in lieu of Channel 238A.

3. Since the proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

4. Commission policy requires that the party benefiting from channel change reimburse an affected party for reasonable costs incurred in changing frequencies. Petitioner is requested to indicate its willingness to reimburse Station WLTK(FM) for reasonable expenses it incurs in changing frequencies.

5. As requested, we shall propose to modify the license of Station WAZR(FM), to specify operation on Channel 241B1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest in the proposed channel for use at Woodstock.

6. In view of the fact that Woodstock, Virginia, could receive its first wide coverage area FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Broadway, Virginia	238A	226A
Woodstock, Virginia	240A	241B1

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Massanutten Broadcasting Co., Inc., permittee of Station WLTK(FM), Channel 238A at Broadway, Virginia, SHALL SHOW CAUSE why its permit should not be modified to specify operation on Channel 226A in lieu of Channel 238A.

8. Pursuant to Section 1.87 of the Commission's Rules, Massanutten Broadcasting Co., Inc., may, not later than, **December 29, 1988** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Massanutten Broadcasting Co., Inc., to furnish additional information. If Massanutten Broadcasting Co., Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Massanutten Broadcasting Co., Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Massanutten Broadcasting Co., Inc., P. O. Box 337, Broadway, Virginia 22815.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **December 29, 1988,** and reply comments on or before **January 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard W. Simcox, Jr., Esquire
Borsari & Paxson
2100 M Street, N.W.
Suite 610
Washington, D.C. 20037
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] By *Memorandum Opinion and Order*, adopted July 26, 1988, the Commission granted the petitioner's Application for Review in order to permit consideration herein.

[2] Initially, there were four applications pending for the use of Channel 238A at Broadway.

[3] The petitioner's proposed site coordinates are 38-45-29 and 78-43-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-167

In the Matter of

Amendment of Section 73.202(b), RM-6125
Table of Allotments,
FM Broadcast Stations.
(Staunton, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 12, 1988; Released: November 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2268 (1988), issued at the request of Ogden Broadcasting of Virginia, Inc. (petitioner), permittee of Station WTON-FM, Channel 232A at Staunton, Virginia, proposing the substitution of Channel 232B1 for Channel 232A at Staunton, and the modification of its construction permit accordingly. Petitioner filed supporting comments reaffirming its intention to construct the higher powered facilities. Goldcup Broadcasting, Inc. (Goldcup), licensee of Station WQRA(FM), Channel 232A at Warrenton, Virginia, filed comments seeking the imposition of an additional site restriction on Channel 232B1. Petitioner responded.

2. Channel 232B1 can be substituted for Channel 232A at Staunton in compliance with the minimum distance separation requirements of Section 73.207(a) of the Commission's Rules with a site restriction. A site restriction of 13.4 kilometers (8.3 miles) southwest of the community is required in order to provide protection to Station WQZK-FM, Channel 231B at Keyser, West Virginia, and Station WQRA(FM), Channel 232A at Warrenton, Virginia.[1]

3. Since the proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirements of Section 73.1030(a) of the Rules.

4. Goldcup, in its comments, argues that in order to protect its future plans to relocate its current transmitter site an additional 8 kilometers site restriction should be imposed on Channel 232B1 at Staunton. Petitioner opposes the additional site restriction. Petitioner states that the increased site restriction would adversely effect its station's ability to provide a city-grade signal over Staunton.

5. In view of the fact that Goldup has failed to present a specific proposal to improve its current facilities, we have determined that its argument is not valid. Therefore, after careful consideration of the information above, we believe the public interest would be served by the substitution of Channel 232B1 for Channel 232A at Staunton since it could provide that community with its second wide coverage area FM service.

6. In accordance with Section 1.420(g) of the Commission's Rules, we shall, as requested, modify the permit of Station WTON-FM to specify operation on Channel 232B1 in lieu of Channel 232A.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Staunton, Virginia	228A, 232B1, 259B

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Station WTON-FM, Staunton, Virginia, IS MODIFIED, to specify operation on Channel 232B1 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates are 38-04-00 and 70-11-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-443

In the Matter of

Amendment of Section 73.202(b),	RM-5968
Table of Allotments,	RM-6208
FM Broadcast Stations.	
(Spokane and Dishman, Washington)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 13, 1988; Released: November 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of P-N-P Broadcasting, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6371 (1987), proposing the allotment of Channel 245A to Spokane, Washington, as that community's ninth local FM service. In response to the *Notice* the petitioner filed supporting comments reaffirming its intention to apply for the new channel. AliMar Communications, Inc. (AliMar), licensee of AM Station KRSS at Spokane, also filed supporting comments stating its interest in the channel. Dishman Broadcasting filed a counterproposal suggesting that Channel 245A be allotted to Dishman, Washington, as that community's first local FM service.[2] Petitioner filed reply comments. Dishman Broadcasting submitted additional comments, to which the petitioner responded. [3]

2. In its reply comments, petitioner suggests as an alternative allotment Channel 293A at Dishman. In addition, petitioner states that based on the expressed interest of AliMar in applying for Channel 245A at Spokane, consideration should be given to the allotment of an additional channel at Spokane. Petitioner's preliminary engineering indicates that Channel 284A is available for allotment to Spokane. Petitioner claims that the aforementioned will resolve the conflict and serve the public interest by permitting additional service at Spokane and a first local FM service at Dishman.

3. We have confirmed the availability Channel 293A at Dishman as well as Channel 284A at Spokane. Therefore, the expressed desires of all parties can be met by allotting Channel 293A at Dishman and Channels 245A and 284A at Spokane. Channel 245A can be allotted to Spokane in compliance with the Commission's minimum distance separation requirements.[4] Channel 284A at Spokane requires a site restriction of 4.7 kilometers (2.9 miles) southwest of the city to avoid a short spacing to a Canadian allotment at Cranbrook, British Columbia. Channel 284C.[5] Channel 293A at Dishman requires a site restriction of 0.9 kilometer (0.6 mile) south of the community to protect Station KAZZ(FM), Channel 296C2, at Deer Park, Washington.[6]

4. Since the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

5. We believe that the public interest would be served by the allotment of Channel 293A to Dishman, Washington, as that community's first local FM service. We also believe that the allotment of the additional channels at Spokane would serve the public interest by providing that community with its ninth and tenth local FM services. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Dishman, Washington	293A
Spokane, Washington	225C, 229C, 245A, 251C, 255C, 260C, 280A, 284A, 289C, 300C

6. The window period for filing applications will open on **December 23, 1988,** and close on **January 23, 1989.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions related to the application process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-6908.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Dishman, Washington, has been added to the caption.

[2] Public Notice of the counterproposal was given on January 8, 1988, Report No. 1705.

[3] We consider the additional comments of Dishman Broadcasting to be late- filed reply comments. Therefore, we have not accepted Dishman Broadcasting's late-filed reply comments nor the petitioner's response thereto in accordance with Section 1.415(d) of the Commission's Rules.

[4] The reference coordinates are 47-40-18 and 117-24-18.

[5] The restricted site coordinates are 47-39-15 and 117-27-44.

[6] The restricted site coordinates are 47-38-55 and 117-16-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-545

In the Matter of

Amendment of Section 73.202(b),	RM-6046
Table of Allotments,	RM-6256
FM Broadcast Stations.	RM-6257
(Hereford and Littlefield, Texas; and Texico, New Mexico)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 14, 1988; Released: November 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 7370 (1987), adopted at the request of Don Werlinger, d/b/a The Broadcast Development Group, Inc. (petitioner), proposing the allotment of Channel 278C2 to Hereford, Texas, as a first wide coverage area FM service. Petitioner filed comments restating an interest in the allotment. In response to the *Notice* James E. Tucker (Tucker) and Paul Abalos (Abalos) filed separate counterproposals seeking the allotments of Channel 278A to Littlefield, Texas, and Channel 279A to Texico, New Mexico, respectively.[2] A first local FM service could be provided at Littlefield and Texico. No reply comments were filed.

2. The counterproposals are mutually exclusive with the Hereford proposal. However, our staff engineering analysis has determined that there are other available channels for use at Littlefield and Texico to resolve the conflict, thus permitting Channel 278C2 to be allotted to Hereford, Texas, as a second local FM service. [3] Channel allotments can be made to the three communities in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Channel 238A can be allotted to Littlefield, Texas, as a first local FM service.[4] Channel 243A can be allotted to Texico, New Mexico, as a first local FM service.[5]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Texico, New Mexico	243A
Hereford, Texas	278C2, 292A
Littlefield, Texas	238A

4. The window period for filing applications will open on **December 23, 1988,** and close on **January 23, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Littlefield, Texas and Texico, New Mexico have been added to the caption.

[2] Public Notice of the filing of the counterproposals was given February 5, 1988, Report No. 1711.

[3] The city reference coordinates are 34-49-18 and 102-23-54.

[4] The city reference coordinates are 33-55-12 and 102-19-54.

[5] The city reference coordinates are 34-23-30 and 103-02-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-407

In the Matter of

Amendment of Section 73.202(b),	RM-5608
Table of Allotments,	RM-5925
FM Broadcast Stations.	RM-6172
(Mandeville and Lacombe, Louisiana	RM-6173
and Long Beach, Mississippi[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1988; Released: November 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, in this proceeding, 2 FCC Rcd 6010 (1987) proposing the conflicting allotments of Channel 234A at Mandeville, Louisiana (RM-5925) and Lacombe, Louisiana (RM-5685).[2] Richard B. Chase III, proponent for the Lacombe allotment, filed comments. William Seiler and John Watkins filed comments and counterproposals. William Seiler, Richard B. Chase III, Beach Broadcasting Limited Partnership and Jo Anne Yates each filed reply comments.

2. We are denying the proposal to allot Channel 234A to Mandeville. As a result of this denial, we will allot Channel 234A to Lacombe. In taking this action, we deny both the counterproposal by William Seiler to allot Channel 235A to Mandeville and his petition for reconsideration. We are also dismissing the counterproposals filed by John Watkins and Beach Broadcasting Limited Partnership, both requesting the substitution of Channel 233C2 in lieu of Channel 233A at Long Beach, Mississippi. We discuss the reasons for these actions below.

Comments and Counterproposal by William Seiler

3. In his counterproposal, William Seiler (Seiler) again requests the allotment of Channel 235A to Mandeville, Louisiana. This allotment requires the substitution of Channel 234A in lieu of Channel 235A at Reserve, Louisiana. [3] Seiler argues that his proposal would provide a first local service in Mandeville and that the proposed Channel 234A allotment will not provide the requisite 70 dBu signal to Mandeville as required by Section 73.315 of the Rules. In addition, Seiler restates his earlier arguments contained in his petition for reconsideration directed against our November 20, 1986 action returning his Channel 235A proposal for Mandeville. In reply comments, Seiler reiterates his interest in filing for Channel 235A at Mandeville.

Comments and Reply Comments by Richard B. Chase III

4. In his comments, Richard B. Chase, III (Chase) reiterates his intention to apply for a Channel 234A allotment at Lacombe and submits an engineering exhibit indicating that the prescribed 12.6 kilometers (7.8 miles) southeast site restriction imposed in the *Notice* for the Channel 234A proposal at Mandeville precludes the required 70 dBu signal over Mandeville.[4] In reply comments, Chase opposes the counterproposals submitted by Beach Broadcasting and Watkins. Chase contends that its Lacombe proposal should, as a first local service, prevail over a proposed upgrade at Long Beach.

Counterproposals by Beach Broadcasting Limited Partnership and John Watkins

5. Beach Broadcasting Limited Partnership (Beach Broadcasting) and John Watkins (Watkins) are applicants for the Channel 233A allotment at Long Beach, Mississippi (File Nos. BPH-870730ML and BPH-870730MA). Both of these parties propose the substitution of Channel 233C2 in lieu of Channel 233A at Long Beach. The proposal conflicts with the Channel 234A proposal at Lacombe. In addition, the parties request that each of the seven applicants for the Channel 233A Long Beach allotment be permitted to amend their pending applications and that the Commission preclude new applications for the Channel 233C2 allotment.

Reply Comments by Jo Anne Yates

6. Jo Anne Yates is also an applicant for the Channel 233A allotment at Long Beach (File No. BPH-870729MF). In this connection, she opposes the upgrade in the Long Beach allotment. Specifically, she refers to the time and resources invested in the preparation of her present Class A application and argues that the necessity of amending seven applications would be a "severe disruption" in the application proceeding.

DISCUSSION

Channel 235 at Mandeville, Louisiana

7. At the outset, it is necessary to consider the Channel 235A proposal for Mandeville. We will do so in both the context of the counterproposal in this proceeding as well as the earlier petition for reconsideration directed against our November 20, 1986, action returning the petition for rule making. For the reasons discussed below, we are denying the petition for reconsideration and the counterproposal.

8. In our November 20, 1986, action, we noted that the proposed Channel 235A allotment at Mandeville was short-spaced to Station WKSJ-FM, Channel 235C, Mobile, Alabama, and then vacant Channel 235A at Reserve, Louisiana. Inasmuch as Channel 235A at Reserve was allotted in MM Docket No. 84-231 (the "omnibus proceeding"), the Commission will not permit the routine substitution of this channel in the absence of a showing of compelling need or Commission error. *Memorandum Opinion and Order*, 50 Fed. Reg. 47291, published November 19, 1985. In returning the petition for rule making, we specifically stated that a first local broadcast service to Mandeville does not meet the compelling need requirement. In his petition for reconsideration, Seiler contends that the compelling need requirement is vague to the extent of violat-

ing administrative law and that the Commission's obligation under Section 307(b) of the Communications Act to provide a fair and equitable distribution of broadcast service outweighs any claim of administrative efficiency.

9. After careful consideration of the arguments advanced in the petition for reconsideration, we adhere to the view that the compelling need requirement is a permissible restriction on the filing of proposals to substitute Docket 84-231 channels. We recognize that the compelling need requirement is, in essence, a limited suspension of our policy of routinely substituting channels in FM allotment proceedings. In adopting this temporary procedure, it was not necessary or feasible to draft a specific rule fully addressing each of the myriad of situations which could arise concerning the approximately 700 FM allotments made in Docket 84-231. Moreover, the existing policy of routinely substituting FM channels in an FM allotment proceeding is not reflected in a Commission rule. As such, the Commission may proceed by either adjudication or rule making to change or modify this policy. *SEC v. Chenery Corporation, et al*, 332 U.S. 194 (1947). Here the Commission opted to proceed on a case by case basis after announcing its intention to modify the previous policy with regard to limited class of cases. In the present situation, we continue to believe that a first local service to Mandeville does not meet the compelling need requirement in view of the disruption to the implementation of BC Docket No. 80-90 and the preclusive effect it would have on other allotments, such as the first local service to Lacombe proposed in this proceeding.

10. We also do not believe that the compelling need requirement is inconsistent with our obligations under Section 307(b) of the Act.[5] In fact, the omnibus proceeding, along with the compelling need requirement, were designed to further the objectives of Section 307(b). In the *Notice of Proposed Rule Making* in MM Docket No. 84-231, 49 Fed. Reg. 11214, published March 26, 1984, the list of proposed allotments was compiled by including communities with no local service, daytime-only AM service, minority service need or public radio service need. Counterproposals in the omnibus proceeding were limited to those proposals which would provide service in any of the above categories or a first or second aural service. These categories further Section 307(b) of the Act. In a proceeding involving approximately 700 allotments, each attempt to find another channel for an omnibus allotment can have a preclusive impact on another omnibus allotment or another petitioner's plan to propose a new allotment or upgrade existing facilities. Such disruption and confusion in the implementation of BC Docket No. 80-90 could undermine Section 307(b), in that service to the public, the ultimate touchstone of Section 307(b), would be delayed.

11. We are also denying the counterproposal in this proceeding proposing allotment of Channel 235A to Mandeville. This allotment requires the substitution of Channel 234A in lieu of Channel 235A at Reserve, Louisiana. In this connection, the Commission announced in a *Memorandum Opinion and Order* in MM Docket No. 84-231, 51 Fed. Reg. 36401, published October 10, 1986, that it would substitute omnibus allotments in situations where the filing window for the omnibus allotment is closed and the proposed channel substitution meets the spacing requirements for each of the sites specified in the pending applications. In the present case there are seven applications for the Channel 235A allotment at Reserve. Substituting Channel 234A at the proposed sites, five of the applications do not meet the minimum spacing requirements. We do no find an overriding public interest benefit in requiring these applicants to amend their applications to specify a new site or requiring an ultimate permittee to specify another site. We believe that such a procedure would be disruptive and unduly delay the institution of a first local broadcast service to Reserve, Louisiana.

Channel 233C2 at Long Beach, Mississippi

12. We are dismissing the counterproposals submitted by Beach Broadcasting and Watkins. Both parties have conditioned their counterproposals on the proposed Channel 233C2 allotment not being opened for additional applications. We will not accede to this request. Since the higher class channel is being made available in Long Beach for the first time, upon allotment we normally must announce a window for the acceptance of new applications, unless the window notice for the lower class channel placed applicants and potential applicants on notice that a higher class channel might be substituted for the lower class channel made available by the notice. The window notice for Long Beach did not do so. Beach Broadcasting refers to the Commission action in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*, 51 Fed. Reg. 20290, published June 4, 1986, as supporting its position that an adjacent or co-channel substitution should not require the acceptance of additional applications. This argument is not well founded. *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels, supra*, involved the Commission authority under Section 316 of the Communications Act to modify existing authorizations. No authorization for Long Beach exists in this situation. Only applications for the Long Beach allotment have been filed. Furthermore, as a matter of policy, we will not open a new filing window for the higher class channel while applications for the lower class channel are pending. *See Lafayette, Louisiana*, 2 FCC Rcd 7303 (1987). It would not be conducive to the efficient transaction of Commission business to process a new set of applications for the upgraded allotment. This would also result in a significant delay in providing new service to Long Beach. Upon grant of a construction permit, the permittee of the Long Beach allotment may file for an upgrade in accordance with Section 1.420(g) of the Rules.

Channel 234A at Mandeville and Lacombe, Louisiana

13. We will deny the Channel 234A proposal at Mandeville because it would not comply with the 70 dBu city grade coverage requirement set forth in Section 73.315 of the Rules. *See Clemson, South Carolina*, 2 FCC Rcd 3583 (1987); *See* also *Wadley and Dadeville, Alabama*, 60 RR 2d 1462 (1986). The *Notice* specifically stated that a Channel 234A allotment at Mandeville would require a site restriction of 12.6 kilometers (7.8 miles) southeast. Since this site restriction is further than we can normally predict city grade coverage, the *Notice* requested an engineering showing that the required 70 dBu signal can be provided to Mandeville. In response to the *Notice*, Chase submitted a detailed engineering exhibit demonstrating that only 40% of Mandeville will receive a 70 dBu signal. In his comments, Seiler states that it is "doubtful" that a Channel 234A allotment will provide 70 dBu coverage to Man-

deville. In view of the above, we will allot Channel 234A to Lacombe with a 3.6 kilometer (2.2 miles) east site restriction.[6]

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to read as follows:

City	Channel No.
Lacombe, Louisiana	234A

15. The window period for filing applications for the Channel 234A allotment at Lacombe, Louisiana, will open on **December 23, 1988,** and close on **January 23, 1989.**

16. IT IS FURTHER ORDERED, That the petition for reconsideration filed by William Seiler directed against the staff action of November 20, 1986, returning his petition for rule making to allot Channel 235A to Mandeville, Louisiana, IS DENIED.

17. IT IS FURTHER ORDERED, That the proposal to allot Channel 234A to Mandeville, Louisiana, IS DENIED.

18. IT IS FURTHER ORDERED, That the counterproposal filed by William Seiler for Channel 235A at Mandeville, Louisiana, IS DENIED.

19. IT IS FURTHER ORDERED, That the counterproposal filed by Beach Broadcasting Limited Partnership for Channel 233C2 at Long Beach, Mississippi, IS DISMISSED.

20. IT IS FURTHER ORDERED, That the counterproposal filed by John Watkins for Channel 233C2 at Long Beach, Mississippi, IS DISMISSED.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] William Seiler has filed a petition for reconsideration directed against the staff action of November 20, 1986 returning his petition for rule making proposing the allotment of Channel 235A to Mandeville. That proposal was short-spaced to Station WKSJ-FM, Channel 235C, Mobile, Alabama and vacant Channel 235A, Reserve, Louisiana, allotted in MM Docket No. 84-231. Channel 235A at Mandeville would also conflict with the present Lacombe proposal on Channel 234A. Except for the conflict with the Channel 234A proposal at Lacombe, a Channel 234A proposal at Mandeville complies with the minimum spacing requirements. Thus, we proposed Channel 234A at Mandeville on our own motion in response to the petition for reconsideration. We will consider both the petition for reconsideration and the Channel 234A proposal for Mandeville in this proceeding.

[3] The counterproposal is identical to the earlier petition for rule making by Seiler for Channel 235A at Mandeville.

[4] In order to allot this channel, the *Notice* imposed a site restriction of 12.6 kilometers (7.8 miles) southeast. The *Notice* specifically elicited comments on whether the requisite 70 dBu city grade coverage can be provided to Mandeville at such a distance.

[5] Section 307(b) requires the Commission to provide a "fair, efficient, and equitable distribution" of radio service to communities throughout the United States.

[6] The reference coordinates for the Channel 234A allotment at Lacombe, Louisiana are 30-18-16 and 84-54-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems
and Their Impact on the
Existing Television Broadcast
Service

Review of Technical and
Operational Requirements:
Part 73-E, Television Broadcast
Stations

Reevaluation of the UHF Television
Channel and Distance Separation
Requirements of Part 73 of the
Commission's Rules

TENTATIVE DECISION AND FURTHER NOTICE OF INQUIRY

Adopted: September 1, 1988 Released: September 1, 1988

By the Commission: Chairman Patrick issuing a statement; Commissioner Quello dissenting in part and issuing a statement; Commissioner Dennis issuing a separate statement.

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I. INTRODUCTION

1. This proceeding was instituted to address the technical, economic, legal, and policy issues presented by development of Advanced Television (ATV)[1] techniques utilizing new methods of signal transmission that may be employed to deliver programs with significantly improved video and audio quality.[2] The action we take today is an important step toward reaching the goal of authorizing terrestrial broadcast facilities [3] that will deliver to the public television pictures with clarity and color approaching that of 35 mm film and sound equivalent to that of compact discs. The primary focus of this proceeding is the initiation of broadcast ATV service. Among the various video distribution media, broadcast television is unique in that it is governed by a complex and interrelated set of both spectrum management and compatibility rules. Nevertheless, because non-broadcast media also are pervasive, we will take account of these media in evaluating our options regarding broadcast television.

2. The prospect of ATV provides great promise, but also presents significant challenge to the broadcast industry and its competitors, to the American electronics and manufacturing industries, and to our traditional broadcast regulatory scheme and associated spectrum management policies. The challenge facing the industry and this Commission is to design and implement a framework for the next generation of broadcasting that will promote efficient realization and wide dissemination of the benefits of this new technology, yet also will permit incorporation of future technological improvements in a timely and efficient manner.

3. In the *NOI*, after describing the existing NTSC[4] transmission system and known ATV system proposals, we requested comment on the difficult and complex issues we must consider in determining whether the public interest will be served by authorizing VHF and UHF broadcast licensees to use ATV transmission techniques, and if so, the regulatory framework that should govern their use. We addressed issues related to the technological feasibility of using spectrum presently allocated for VHF and UHF broadcasting and the availability of additional suitable spectrum; the costs and benefits of utilizing ATV techniques in the VHF and UHF broadcast services and compatibility between ATV transmissions and NTSC receivers; and public policy issues related to competing demands for spectrum and ensuring uninterrupted service during transition from the NTSC system to either an ATV system or a mixed NTSC and ATV environment.

4. In this Tentative Decision and Further Notice of Inquiry (*Further Notice)* we begin the process of narrowing the issues related to the introduction of terrestrial broadcast ATV service by ordering our priorities and making several tentative findings as follows.

1. We find that providing for terrestrial broadcast use of ATV techniques would benefit the public.

2. We tentatively conclude that the benefits of this technology can be realized by the public most quickly if existing broadcasters are permitted to implement ATV.

3. We also tentatively conclude that any spectrum capacity needed for broadcast ATV system will be obtained from the spectrum now allocated to broadcast television. In the interests of efficient use of the spectrum and minimization of disruption to other services, we do not intend to consider the use of any frequency bands not already allocated for television terrestrial broadcasting.

4. We find that existing service to viewers utilizing NTSC receivers must be continued irrespective of the actual manner in which ATV services are delivered, at least during a transition period. This can be accomplished either by transmitting ATV signals that can be received directly by NTSC receivers or by simulcasting NTSC and incompatible ATV signals on separate channels.[5]

5. Our strong predisposition to require NTSC receiver compatibility and the scarcity of suitable spectrum within the existing allocations lead us to conclude that systems requiring more than 6 MHz to broadcast a noncompatible signal, such as the MUSE HDTV 9 MHz system, will not be authorized for terrestrial broadcast service.

6. We find it in the public interest not to retard the independent introduction of ATV in other services or on non-broadcast media, but we are sensitive to the benefits of compatibility between equipment associated with the various video delivery methods.

5. The record in the first phase of this proceeding, including the comments filed by parties and the detailed substantive information developed by the Planning Subcommittee of the Advisory Committee on Advanced Television Service and the Advisory Committee's Interim Report,[6] has been of significant assistance in narrowing the issues and focusing debate on the issues related to possible authorization of ATV broadcast service. In addition to the subjects addressed in the tentative decision portion of this *Further Notice* summarized above, we also seek comment on and analysis of a number of additional related issues in the notice of inquiry portion.[7]

1. We seek comment on the issues, recommendations, and conclusions expressed by the Advisory Committee in its Interim Report.

2. We seek additional information on ATV systems being designed for terrestrial broadcast service,[8] including the feasibility of their operating under the interference limitations indicated by studies of the VHF and UHF spectrum.[9]

3. Within the existing allocations, we believe that our options to accommodate ATV are: (a) provide ATV within existing 6 MHz assignments; (b) provide to each broadcaster an additional 3 MHz for an augmentation signal; or (c) provide to each broadcaster an additional 6 MHz for either an augmentation signal or for a dual non-compatible ATV signal. We are particularly interested in comment on the advantages and disadvantages of these options.

4. We also seek additional comment on how standards should be established for ATV and whether we should relax or repeal the NTSC standard.

5. We intend to conclude our assessment of various spectrum options expeditously and, if we conclude that the spectrum associated with each allotment can and should be increased, to propose plans for that purpose. Therefore we request comment on possible

scenarios for distributing supplemental spectrum if it is decided to do so, including allotment and assignment procedures we should follow.

6. Finally, we also request comment on adjustments we could authorize to permit licensees to negotiate with each other regarding their service areas in order to encourage the prompt and efficient introduction of ATV.

II. BACKGROUND

A. *Procedural History*

6. To obtain information and develop a record upon which to make decisions related to the possible introduction of ATV, in July, 1987 we adopted the *NOI* in response to petitions from MST[10] and 57 additional parties. At that time there existed only limited information about ATV, and thus we requested information on a wide range of topics related to possible implementation of some form of broadcast ATV service.[11] In response to the *NOI* we received 70 comments, 26 reply comments, and 3 petitions to file supplemental information. A list of the commenting parties is attached as Appendix A.

7. In conjunction with the *NOI*, we issued an order freezing new television station license applications and allotment requests in the 30 major cities in which we believed a broadcast spectrum shortage might exist if we approve an ATV system requiring more spectrum than the present 6 MHz per station.[12] Finally, in October we granted a Petition for Special Relief filed by the same parties that petitioned for issuance of the *NOI*, deciding to defer action on additional sharing between UHF television and private land mobile stations until the Interim Report is received and we have considered the information presented after opportunity for public comment.[13]

8. We established the Advisory Committee in November, 1987 to gather and study information and make recommendations on ATV relevant to the difficult technical, economic, and public interest determinations that we must make.[14] The Advisory Committee is composed of industry leaders representing diverse viewpoints, including those of the television broadcast networks and stations, equipment manufacturers, cable systems, and the communications bar. The focus of the Committee's first six months has been to plan for the actual testing and evaluation of ATV systems, to evaluate the need for and availability of additional spectrum, and to assess the economic costs and benefits of introducing ATV.

9. At this stage approximately 175 participants have contributed to the work of the Subcommittees and Working Parties created to accomplish these tasks. The Committee has benefited from the cooperation extended by the Advanced Television Systems Committee (ATSC)[15] and expects to benefit similarly from cooperation with the newly-formed Advanced Television Test Center (ATTC).[16] On June 16, 1988, the Advisory Committee submitted an Interim Report to the Commission, discussed below. We have placed in the record of this proceeding the following documents from the Advisory Committee: a copy of the Advisory Committee Interim Report and associated comments by Advisory Committee members, the reports of the 6 working parties and 2 advisory groups of the Planning Subcommittee, and the Chairmen's summaries of these reports. Additional studies conducted by the Commission's Office of Engineering and Technology (OET) on spectrum availability and the NTSC UHF taboos also have been completed and placed in the record.[17] Thus there exists a substantial record upon which our tentative decisions and further inquiry are based.

B. *Advisory Committee Interim Report*

10. On June 16, 1988, the Advisory Committee submitted an Interim Report containing recommendations on the fundamental parameters and spectrum requirements for ATV. The attributes and spectrum requirements of proposed ATV systems and the planned future work of the Advisory Committee are discussed in the Interim Report. The Advisory Committee concludes in the Interim Report that to remain competitive, broadcasters must have the opportunity to deliver HDTV-quality signals to their audiences, and that therefore efforts should be focused on establishing an HDTV standard for terrestrial broadcasting. The Advisory Committee states in the Report that at the present stage of technical development, channels of more than 6 MHz are necessary to transmit HDTV signals competitive in quality to those that will be offered by the non-broadcast media, and that therefore efforts also should be focused on determining the availability of spectrum.

11. The Advisory Committee categorized the spectrum requirements of systems designed to operate below 1 GHz as being 6 MHz, 9 MHz, or 12 MHz, and noted that 12 MHz systems may consist of either an existing NTSC-compatible channel supplemented by another 6 MHz that is not necessarily contiguous with the main channel, or an existing NTSC channel and another 6 MHz used to simulcast ATV programming. The Advisory Committee recommended that consideration be given the burdens that would be placed upon the broadcast, cable, and other industries that retransmit broadcast signals by any system that would require more than the existing 6 MHz.[18]

12. Although the Advisory Committee did not rule out the possibility that consumers may accept enhanced or improved picture and audio quality that is somewhat less than that of true HDTV, which it equated to the quality of 35 mm film, it suggested that systems resulting in less improvement be considered as solutions that might facilitate the transition from NTSC to HDTV.[19] The Advisory Committee also concluded that for the immediate future it is essential that any broadcast system be compatible with NTSC because of the substantial public investment in existing NTSC receivers. The Advisory Committee noted that many of the proposed systems would achieve compatibility either by augmenting NTSC signals or by simulcasting a non-compatible ATV channel with an NTSC channel.

13. The Advisory Committee stated that the long-term implications of the options may be significantly different from those of the short term, and urged that the different considerations over different time periods be considered carefully. For example, it noted that a 9 MHz non-contiguous system compatible with NTSC receivers is more spectrum efficient for the short term than a 12 MHz system that transmits a 6 MHz non-compatible ATV signal and a standard NTSC signal on a separate 6 MHz channel, thereby occupying a total of 12 MHz. However, the long-term spectrum implications may be the opposite, because the simulcast 6 MHz NTSC channel may be discontinued

when ATV achieves significant market penetration. The spectrum thus released then would be available for another broadcast channel or for other purposes.[20]

14. The Advisory Committee concluded that sufficient spectrum capacity might be available within the existing VHF/UHF allocations for either the augmentation or simulcast approach, provided that (1) all the UHF "taboos" can be disregarded in the ATV environment, and (2) ATV systems can successfully operate with co-channel and adjacent channel interference protection that is less than that required by NTSC operation. The Advisory Committee stated that additional spectrum outside the existing broadcast allocations will have to be considered if these two conditions cannot be met.[21] The Advisory Committee also stated that no attempt should be made to retard the introduction of ATV by other non-broadcast means (such as by videocassette recorder or cable) while the necessary studies and analyses proceed, but recognized that problems may arise if the introduction of equipment for these other media result in the establishment of a *de facto* transmission standard that is not conducive to broadcast transmission. In order to accommodate the possibly different transmission standards of different media, the Committee suggested that attention be focused on development of inexpensive interfaces or receivers capable of accommodating different reception standards.

C. *International Developments*

15. In Europe, broadcasters plan to deliver HDTV-quality service by satellite rather than by terrestrial broadcasting.[22] The planned system will be incompatible with the PAL[23] and SECAM[24] terrestrial systems now used and terrestrial broadcast standards will remain the same. The HDTV system is designed to be compatible with a first generation European DBS system based upon a multiplexed analog component (MAC) design. Therefore in Europe it will be necessary to purchase both a satellite receiving antenna and a receiver dedicated to this type of reception. In some countries the satellite signals also may be carried on cable systems, but the consumer still will have to purchase a special receiver to view the signals with HDTV quality.

16. In Japan, the Ministry of Post and Telecommunications has decided to provide HDTV-quality service by satellite and also to provide for improved terrestrial service using an NTSC-compatible system that delivers better quality than the existing NTSC system but less quality than the satellite-delivered HDTV service. The HDTV satellite service is scheduled to be implemented in 1990 using the MUSE HDTV 9 MHz system[25] while inauguration of the first generation of improved terrestrial service is expected in 1989.[26]

17. BTA, a voluntary organization established in Japan by broadcasters and equipment manufacturers in cooperation with the Japanese Ministry of Posts and Telecommunications, plans to select an improved system to be used for terrestrial broadcasting. The new terrestrial broadcast standard will be limited to 6 MHz in bandwidth, and will be compatible with the existing NTSC system.[27] Ten different techniques are being considered.[28] and BTA states that it is tentatively planning to develop two generations so that future technological advances will be incorporated by Japan's terrestrial broadcasting services. The first generation of improved terrestrial service is expected to be inaugurated in 1989.[29]

18. BTA states that it expects the coexistence of different terrestrial and satellite systems to spur additional development of television improvements.[30] The first generation is intended to improve picture quality by combining several enhancement methods, but not change the aspect ratio. BTA states that second generation will further improve picture quality by increasing the aspect ratio and other facets. BTA notes that some of the systems proposed in the United States are similar to the systems under consideration in Japan, and concludes that a common system could be developed for both countries.[31]

19. NHK suggests that a system could be used to facilitate transition from NTSC to ATV, and notes that it has developed a family of ATV systems based upon MUSE technology that it argues could be used for an orderly transition from NTSC to HDTV in the United States.[32] According to NHK, stations could provide a gradual transition to MUSE HDTV by adopting the NTSC-compatible MUSE system referred to as MUSE-6 because production and transmission equipment will be compatible between MUSE-6 and MUSE HDTV. NHK states that MUSE-6 can be employed within the existing 6 MHZ channels, and that if 3 MHz of contiguous spectrum is allocated later, only the encoder, transmitter and transmission lines would have to be changed to implement full MUSE HDTV.[33] NHK stresses, however, that MUSE-6 performance is significantly inferior to that of MUSE HDTV.[34] Sarnoff points out that its ACTV system as well as the MUSE family provide a transitional mechanism to HDTV.[35]

20. Thus it appears that both Japan and European nations are planning to provide ATV services, although implementation plans differ. While the European approach does not contemplate improvements to terrestrial broadcasting, the Japanese plans provide for making improvements to terrestrial broadcasting by implementing an improved NTSC system.

21. Also, there has been considerable discussion within the CCIR,[36] the United States, and other countries concerning international agreement on a single world-wide HDTV production standard. Within the United States, the Advanced Television Systems Committee (ATSC) and the Society of Motion Picture and Television Engineers (SMPTE) have approved as a voluntary HDTV production standard an interlaced scanning standard based upon 1125 lines and 60 fields per second. Several European countries have proposed a progressive scanning system based upon 1250 lines and 50 fields per second. While national and international efforts at production standardization are outside the scope of this proceeding and indeed outside of our jurisdiction, in considering the various proposed ATV systems, the availability of programs and their compatibility with various production standards are relevant to the overall quality and likely success of specific systems. Converting from a production source to a transmission source introduces a number of factors that might result in certain systems producing better results with one or another of the available program sources, and this is relevant to our consideration of the systems. Therefore we solicit information on the program signal formats that are to be utilized by the various system proponents. In addition, we request comment on the compatibility of the various systems with 35 mm film standards, the proposed 1125/60 standard, the European 1250/50 proposal, and any additional production standards.

D. *Proposed ATV Systems* [37]

1. Introduction

22. A number of organizations are planning to test and evaluate systems proposed for terrestrial use in the United States. It is anticipated that the Advisory Committee will conduct tests in cooperation with ATSC and ATTC to evaluate systems of those that voluntarily cooperate, and will report the test results and recommendations to the Commission and the public. The Advisory Committee and other industry groups plan not only to evaluate the technical performance of the individual systems, but also to conduct analyses to determine the level of quality and associated cost that is most acceptable to the public. The Advisory Committee's Systems Subcommittee has requested detailed technical descriptions and will conduct laboratory and field testing of the proposed systems. NCTA also is planning to test the suitability of ATV systems for cable delivery. Cooperation among these organizations may lead to industry consensus on the attributes of the system or systems most suitable for terrestrial broadcast purposes. The systems known to us to be under development are briefly discussed below. A number of different techniques are being developed to improve NTSC, to transmit high-quality video and audio within the existing 6 MHz channels, and to transmit improved signals using greater bandwidth.

2. NTSC-Compatible Systems

23. Several techniques have been proposed to improve the images displayed by NTSC that would not require an increase in bandwidth or significant change in the NTSC standard. There also are several systems that use a significantly altered NTSC standard but remain compatible with existing NTSC receivers. (Technical terms used in this section and elsewhere in this *Further Notice* are defined in Appendix C.)

24. According to Hitachi, its system uses progressive scanning and an aspect ratio of 4:3. "Three dimensional" luminance and chrominance filters are used in receivers that have frame store capability to provide progressive scanning. Hitachi states that this method is used to reduce cross color and cross luminance artifacts and to increase resolution. Hitachi states that it has found a method to utilize spectrum within a standard 6 MHz NTSC signal to increase chrominance and high-resolution luminance information.[38]

25. Matsushita states that its proposed system, QUME, produces widescreen images with greater resolution and reduced artifacts. Matsushita states that QUME adds extra information to the NTSC signal by modulating the detail and 16:9 aspect ratio information in quadrature with the video carrier. According to Matsushita, this design creates 1 MHz of additional bandwidth within the standard NTSC signal in which detail information can be transmitted without interference to other signal components that form the composite NTSC signal.[39] Although their system uses 6 MHz, Matsushita argues that broadcasters should be alloted additional spectrum so that performance can be improved to as close to that of MUSE HDTV as possible.[40]

26. Nippon states that it is experimenting with several techniques. One technique it describes to obtain a high resolution image is to divide the detail signal transmitted between 4.2 MHz and 5.6 MHz into blocks that are transmitted with information indicating the priority of each block. According to Nippon, once priority has been assigned, quality images can be transmitted efficiently with only 5-10 percent of the entire detail block.[41]

27. Techniques for improving NTSC performance have been developed by Faroudja Laboratories and are now being marketed in the United States under the trade name SuperNTSC. Equipment reported to be available includes encoders, decoders, vertical and horizontal detail processors, flesh tone correctors, and transcoders. These products have been marketed for studio use, and broadcast and cable demonstrations using Faroudja equipment have been presented.[42] The system is intended to diminish cross color and other undesirable products.[43]

28. A number of systems are being developed to deliver improved performance to special receivers, yet continue to deliver NTSC quality service to conventional receivers. These systems use either 6, 9, or 12 MHz.[44] Among the single-channel proponents is the Del Rey Group.[45] Their system, named HD-NTSC, uses a subsampling technique to compress a high definition image to 6 MHz yet maintain NTSC receiver compatibility. Del Rey's "tri-scan" technique divides each picture element into three subpixels, each of which is transmitted in turn in each successive frame. The system slows the frame rate to ten per second for stationary objects, but keeps the NTSC frame rate of thirty per second for objects in motion, thereby increasing bandwidth efficiency. The aspect ratio is increased to 14:9, although Del Rey's comments state that 5:3 may be possible. Progressive scanning is used at the receiver, and the system is equipped with digital audio. In comparision to NTSC, HD-NTSC receivers are expected to display improved resolution for stationary objects (spatial resolution). However the resolution of moving objects (temporal resolution) will be slightly degraded relative to NTSC.

29. Schreiber[46] describes a 6 MHz NTSC compatible system that has been developed by the Massachusetts Institute of Technology (MIT) called MIT-RC (Receiver Compatible).[47] MIT-RC uses a portion of the height of the NTSC frame to enhance resolution signals. As described by Schreiber, digital audio and enhanced color through subsampling are possible additions to the signal.

30. Two ATV systems have been proposed that are NTSC compatible and would be transmitted within a 6 MHz channel, but both are designed to provide even better performance if supplemental spectrum is available. The David Sarnoff Laboratories' system, Advanced Compatible Television (ACTV), is being developed in two formats.[48] The 6 MHz version, ACTV I, compresses higher resolution, widescreen images into a 6 MHz channel while maintaining compatibility with NTSC receivers. The system uses subcarriers modulated in quadrature to provide extra information for increasing resolution and for constructing the side panels needed to obtain a 5:3 aspect ratio on ACTV receivers. ACTV I may use either 1050 line interlace or 525 line progressive scanning. A different system named ACTV II would deliver improved video resolution and digital sound comparable to that of compact discs. It would require an additional 3 or 6 MHz, not necessarily contiguous.

31. In addition to the MUSE HDTV system discussed above, NHK also is developing an NTSC compatible system, MUSE-6, that could be implemented initially on one channel and upgraded if extra spectrum becomes available.[49] MUSE-9 requires a 3 MHz supplemental channel that is not necessarily contiguous to the main channel.

32. There are two proposed systems that maintain compatibility with existing NTSC receivers but require additional spectrum. One, VISTA, developed by the New York Institute of Technology (NYIT), produces improved resolution and widescreen images.[50] VISTA is transmitted using one NTSC channel and either a 3 MHz or 6 MHz supplemental channel that does not have to be contiguous. To achieve compatibility, the NTSC portion of the signal is unaltered. Enhancement information is transmitted on the supplemental channel to improve spatial and temporal resolution. The frame-rate for transmission of the detail information is lower than normal to conserve bandwidth because human vision requires a longer time period to perceive high quality motion rendition.

33. Another proposed system that uses additional spectrum but maintains receiver compatibility is being developed by North American Philips (NA Philips).[51] Their system, called HDNTSC, was introduced as a 12 MHz system, but now could use 9 MHz.[52] The baseband HDNTSC information is packaged in two signals: the first is the NTSC signal, which is transmitted according to existing standards; the second contains additional information and is transmitted on a supplemental channel that does not have to be contiguous. The additional information includes the side-panels to extend the NTSC aspect ratio to 16:9, information to increase spatial and temporal resolution, pan-and-scan capability,[53] and digital multichannel sound. NA Philips states that the NTSC portion of the signal can be modulated in the conventional analog manner and the supplemental signal could be digital, thereby making the system more flexibile with respect to interference constraints.[54]

3. NTSC-Incompatible Systems

34. Systems that are incompatible with NTSC and that can be transmitted in a single 6 MHz channel also have been proposed. One developed by Schreiber is called MIT-BE (Bandwidth Efficient).[55] MIT-BE is part of a family of 6 MHz ATV systems (the other member is MIT-RC, described above) in which channel utilization efficiency is increased by using double-sideband quadrature modulation and eliminating the sound carrier and retrace intervals. A frame store and additional signal processing is required at the receiver. Provision is made for limited data transmission and digital audio.

35. NHK also has developed an additional compressed version of MUSE called Narrow-MUSE that can be transmitted in a single 6 MHz channel.[56] While this system does not perform as well as MUSE HDTV, NHK states that Narrow-MUSE does perform better than either of the NTSC compatible MUSE systems. Narrow-MUSE has been demonstrated by computer simulation.

36. Three systems that are designed for satellite delivery of ATV are NA Philips HDMAC-60, Scientific Atlanta HDB-MAC, and MUSE HDTV. None of these systems are compatible with NTSC. The Philips and Scientific Atlanta systems are multiplex analog component (MAC) systems using time division mutiplexing. This improves the separation of luminance and chrominance components over that of NTSC, reducing artifacts caused by combining these components in a single composite signal. NA Philips envisages its system being used to deliver programming to terrestrial broadcast stations, cable system headends, or directly to viewers' homes by DBS.[57] Scientific Atlanta's system is a High Definition version of its B-MAC DBS delivery system. B-MAC currently is being used to deliver programming by satellite.[58] MUSE HDTV is a bandwidth compressed version of the NHK studio standard.[59] Using this MUSE system, luminance and color difference signals are band-limited and then sampled. Quality losses due to compression are compensated for by receiver technology, including frame stores and devices that detect motion and take advantage of the eye's limited ability to resolve temporal resolution.[60]

4. Additional Systems

37. There are additional systems proposed that have technical parameters not known to us. A-Vision, Production Services, Inc., General Instrument Corporation, Avelex, Zenith, Viento Laboratories, Inc., and Osborne state that technical specifications for their ATV systems will be submitted to Working Party 1 of the Advisory Committee's Systems Subcommittee.[61] In addition, three parties have proposed video and audio enhancement techniques that could be used as components of ATV systems: Quanticon (QUANTV), Digideck, and Dolby. Quanticon has patented a number of video enhancement techniques. Dolby and Digideck each propose audio subsystems. According to MST, two system proponents, AT&T Bell Labs and CBS, have withdrawn from research into ATV systems.[62]

E. Alternatives to VHF / UHF Broadcasting

38. In the *NOI*, we requested that parties compare the advantages and disadvantages of using the broadcast spectrum and services to transmit ATV-quality signals with using other existing services and spectrum, such as the Direct Broadcast Satellite Service (DBS), Multichannel Multipoint Distribution Service (MMDS), or an entirely new "ATV" service. We also requested comment on the costs and benefits of using spectrum to deliver high quality video programming to the public compared to relying upon methods that do not use spectrum, such as VCRs, videodisc players, and cable.

39. On the basis of the comments received, we conclude that broadcast stations provide services unique in the array of entertainment and non-entertainment programs freely available to the American public. Unlike many other countries, the United States has a strong and independent system of privately-owned and operated broadcast stations that transmit local and regional news, information, and entertainment as well as national and international programs. Therefore, initiating an advanced television system within the existing framework of local broadcasting will uniquely benefit the public and may be necessary to preserve the benefits of the existing system. Also, we believe that the benefits of these new technological developments will be made available to the public in the quickest and most efficacious manner if existing broadcasters are permitted to implement ATV. We emphasize that this decision does not foreclose provision of ATV services by other means, both those that use spectrum and those that do not. Thus, we conclude that broadcasters should be permitted to utilize ATV transmission techniques within the existing VHF and UHF bands to the extent that this use can be accommodated and that continued broadcast service to the public is not disrupted, including service to those viewers with NTSC standard receivers.

III. SPECTRUM ISSUES

A. *Introduction*

40. In this section we consider the possibilities for providing additional spectrum to implement ATV service. In particular, we address the requirements of the various proponent ATV systems, the advantages and disadvantages of the options, and the region of the spectrum best suited for supplemental allotments. Most parties agree that the technical quality of broadcast signals increases with bandwidth, but the quality desired by the public and the "optimum" quality, given the complex tradeoffs, are far from certain.

B. *Spectrum Availability*

1. Positions of the Parties

41. The commenting parties generally discuss three possible spectrum requirements for terrestrial ATV systems in the VHF and UHF bands: (a) 6 MHz (one present channel), (b) 9 MHz (one and one-half present channels), or (c) 12 MHz (two present channels). Two of the 6 MHz systems are reported to have the capability of using an additional 3 MHz to attain additional enhancement if it is available. Of the systems proposing to use 9 MHz, some do not require that the additional 3 MHz be contiguous to the main channel. Advocates of a 12 MHz approach suggest that the additional 6 MHz could be used either (1) to supplement the main channel by providing additional information that would be integrated with the main signal at the receiver, or (2) to simulcast an ATV signal with the NTSC signal.[63]

42. Most broadcasters state that it is too early to decide whether 6 MHz is enough bandwidth to support ATV service of sufficient quality to compete with the full HDTV quality that might be delivered by other media, and argue that additional testing is necessary before a decision can be made on bandwidth. Cap. Cities/ABC argues that existing knowledge is insufficient to determine the bandwidth necessary to provide competitive quality, and concludes that before bandwidth decisions are made more knowledge is needed on the technical possibilities and the likely response of the public to degrees of change in aspect ratio, resolution, and other characteristics.[64]

43. MST points out that NHK, NA Philips, and NYIT all have developed systems based on the position that it is not possible to deliver within 6 MHz a signal compatible with NTSC receivers with true HDTV quality. MST argues that additional spectrum should be preserved to permit terrestrial ATV compatible with existing NTSC receivers to develop. MST states that not to plan for additional spectrum capacity may foreclose systems that will be compatible with existing receivers, significantly increase the cost to consumers by requiring the use of spectrum with poorer propagation or more expensive receivers, or totally preclude terrestrial broadcasters from delivering ATV.[65] Similarly, NBC, which expresses support for the Sarnoff ACTV system, states that even if 6 MHz proves adequate, the Commission still should reserve additional spectrum for broadcasters so that future technological improvements can be implemented.[66]

44. According to NHK, there is little probability that a system will be developed soon that has the quality of its 9 MHz HDTV MUSE, is NTSC compatible, and can be transmitted within 6 MHz. [67] Matsushita agrees that it does not expect successful development of a 6 MHz "HDTV quality" system.[68] Similarly, Toshiba states that there is "little chance" that bandwidth can be reduced to 6 MHz.[69] Home Box Office, a cable network owned by Time, also states that 6 MHz may not be enough bandwidth to deliver signals of the desired quality.[70] However, Zenith states that history and experience suggest that improved technology eventually might result in a 6 MHz system that produces fully acceptable picture quality, and recalls that at one time creating a color television standard compatible with monochrome seemed impossible.[71] Also, LMCC argues that requiring ATV systems to operate within the existing 6 MHz channels will promote development of spectrum efficient transmission methods as well as permit improved broadcast signal quality.[72]

45. Time states that bandwidth greater than 6 MHz could cause severe technical problems for cable distribution of broadcast signals because greater bandwidth will require new cable converters that would add considerable complexity and cost to converters used by cable systems on customer premises and new equipment at cable headends. Also, Time argues, if broadcasters use more than 6 MHz, particularly if non-contiguous spectrum is used, there also may be significant problems with ghosting, airplane flutter, and harmonically related carriers used by cable systems to minimize interference. Finally, Time notes that cable systems have a large but finite bandwidth, that many systems today are operating at or near full capacity, that adding capacity is costly and that increasing signal bandwidth might result in cable operators dropping services in order to devote the additional bandwidth to each broadcast signal.[73]

46. Several parties argue against authorizing additional bandwidth because they prefer other uses of the spectrum. According to LMCC, adopting this course of action also will permit increased sharing of UHF channels to relieve "the critical and growing need for additional spectrum in the Private Land Mobile Radio Services.[74] Rogers also argues that any additional UHF broadcast spectrum available should be used for mobile radio and telephone purposes rather than ATV use, assuming equal consumer demand for the two services, because broadcast services can be received over cable by seventy percent of the population and functionally equivalent ATV services will be available with videocassette recorders, laser disc players, and satellite services, whereas there is no functional equivalent for mobile radio services.[75] CBS, however, states that sharing spectrum with land mobile services would cause significant degradation to existing television stations and that land mobile needs can be fulfilled with their existing allocations if they utilize spectrum-efficient technologies.[76]

47. RTT states that additional spectrum could be used for interactive video services through which viewers could communicate with their service provider. According to RTT, its system, T-NET, permits two-way wireless transmission of data on channels adjacent to that of an operating station, permitting viewers to communicate using a keypad, a computer terminal, or a voice device for purposes of home shopping and banking, viewer surveys, educational functions, and general data communication.[77]

48. Neuman states that we must address the trade-off between signal quality and authorizing more diverse sources of programming at the present level of transmission quality.[78] Similarly, NBMC states that new opportunities for minority television ownership are available only in the UHF band, and argues that the public will suffer from a

reduction in programming diversity if ATV prevents establishment of new minority owned television facilities.[79] However, CBS disagrees, and states that there would be little public benefit from additional television licensees if they were deprived of HDTV capability and therefore relegated to being providers of an inferior service.[80]

49. No party supports the option of obtaining a contiguous assignment by totally "repacking" the UHF and VHF spectrum into 9 MHz channels. MST states that partial or total repacking of the VHF and UHF band is an "extremely undesirable option" because it would be more costly and disruptive than justified by the possible benefits.[81] Sarnoff submits that total repacking would be difficult to implement, would make existing receivers obsolete, and would require several technical studies to determine whether repacking is even feasible.[82]

50. Several parties discuss the likely technical and economic ramifications that non-contiguous scenarios would entail for broadcasters and viewers. MST states that many experts believe that use of non-contiguous spectrum would create ghosting problems that could be difficult and costly, if not impossible, to correct.[83] Similarly, Blonder Tongue states that "in the real world of ghosts, noise sources and atmospheric anomalies, non-contiguous frequencies, particularly if emanating from physically displaced antennas, may even drop the ATV picture quality below the level of a normal NTSC transmission.[84]

51. Additionally, NHK argues that use of multiple demodulators, if non-contiguous spectrum is used, would lower picture quality because of differences in the transmission and reception characteristics of the two channels.[85] Zenith concurs that use of non-contiguous supplemental spectrum probably would accentuate multipath distortion and other transmission differences and thereby degrade picture quality. In addition, Zenith notes the extra cost to consumers for a separate tuner if augmentation spectrum is non-contiguous. Schreiber also states that non-contiguous spectrum is less likely to work properly under actual operating conditions than two contiguous channels.[86] Similarly, Matsushita agrees that differences in transmission characteristics between widely separated frequencies would restrict the system and lead to higher receiver cost.[87]

52. Based on the design of both the NYIT and NA Philips systems, MST states that signals transmitted on two non-contiguous frequencies could be integrated by a sophisticated receiver that automatically would select the second channel as directed by a digital code inserted in the vertical blanking interval of the NTSC channel. MST states that such a receiver probably would employ field stores to convert the NTSC portion of the signal from interlaced to progressive scanning.[88] NYIT states that initially its VISTA receivers would cost "slightly more" than large-screen projection displays.[89] NA Philips also states that its ATV receivers would be more expensive than current models.[90]

53. CBS expresses support for the simulcast option, noting that programming would not necessarily have to be the same on the NTSC and ATV channels, but rather, that ATV could develop as a separate service.[91] This option would permit broadcasters either to (1) simulcast programming in NTSC and ATV; (2) broadcast in ATV only and abandon NTSC or (3) continue using only NTSC.

2. Studies Related to Spectrum Availability for ATV

a. Advisory Committee Spectrum Study

54. The Planning Subcommittee of the Advisory Committee established the Spectrum Utilization and Alternatives Working Party (Working Party 3) to study the availability of spectrum to support various alternative technical systems for terrestrial ATV service. Its report and conclusions were limited by the short amount of time available as well as the fact that the exact characteristics of the proponent ATV systems are not known. This Working Party is continuing to study spectrum alternatives.

55. Since the spectrum requirements for many of the proposed systems, their interference characteristics, and the interference performance of ATV receivers were not known, the Working Party developed a set of assumptions regarding these criteria. Using two similar computer data bases supplied by the FCC and the NTIA containing information on existing television assignments, the Working Party estimated the number of stations that could be accommodated with additional spectrum under various assumed conditions using the existing VHF and UHF allocations. In its analyses only co-channel and adjacent channel interference were considered. Other UHF taboos were disregarded.

56. The Working Party drew two broad conclusions from its study. (1) "[T]he greatest likelihood of finding additional spectrum for each station to use in conjunction with their existing channels on either a compatible or simulcast basis occurs when the additional spectrum is not necessarily contiguous"; and (2), "there are combinations of cochannel and adjacent channel interference performance/protection which might allow the utilization of extra spectrum for all existing stations and allotments to provide [ATV service]".[92]

57. The Working Party concluded that in order to have a reasonable chance of accommodating most present stations, in the worst case the ATV supplemental channel would have to be capable of tolerating a 6 dB D/U ratio.[93] If the system could not tolerate these conditions for the supplemental channel, either fewer than all stations could be accommodated, or ATV service areas would have to be smaller then current service areas. The Working Party also concluded that assignment of supplemental spectrum would be more difficult in urban areas than in rural areas.

58. A report on ATV use of channels affected by the UHF taboos was submitted to Working Party 3 by Donald M. Jansky and Robert A. O'Connor. This report argues that the taboos are not necessarily a barrier to the introduction of ATV systems because these systems can be designed to use taboo spectrum without causing unacceptable interference to NTSC receivers, and ATV receivers can be designed to eliminate any interference that may be caused by NTSC transmissions. Jansky and O'Connor note the technical advantages of co-location, stating that co-location of transmitters provides better protection for both IF beat and intermodulation interference than the currently required 20 mile separation. Also, they state that an ATV augmentation signal would have none of the characteristics that led to adoption of the taboos. Finally, using data submitted in Zenith's comments, they predict that ATV augmentation signal power levels will be low enough not to cause interference to UHF NTSC broadcasting.[94]

59. With regard to its study of spectrum between 1 and 13 Ghz, the Working Party concluded that although all of this spectrum is allocated and being used, it may be feasible to accommodate an ATV system on a shared basis in some part of this range. It stated that further consider-

ation will await the results of propagation tests being conducted by ATSC to determine the feasibility of possibly using spectrum in this microwave range for terrestrial ATV broadcasting.

b. OET Studies of Spectrum and Receivers

60. As discussed in the *NOI*, the availability of spectrum is an essential factor in considering the options for implementing ATV service. The Commission's Office of Engineering and Technology (OET) has performed two studies that analyze the availability of spectrum for ATV service. The first study examined the possibility of providing existing television stations with additional spectrum for ATV within the existing VHF and UHF allocation. Additional spectrum considered by this study would be made available principally by eliminating the UHF assignment restrictions generally known as the "UHF taboos".[95] The second study examined receiver performance to determine the potential for interference to present receivers if the taboo channels were used for ATV augmentation. Reports describing each of these studies have been placed in the record.[96] We invite comment on these studies and the implications of their results for possible allotment of additional spectrum for ATV purposes.

61. *Spectrum Availability Study*. The spectrum availability study was conducted in two phases. Phase 1 examined the results of providing an additional 3 or 6 MHz contiguous to existing assignments and is germane to systems that require a contiguous channel 9 or 12 MHz wide. Phase 2 examined the possibility of assigning an additional 3 or 6 MHz that is not necessarily contiguous to existing assignments, and applies to those systems that use supplements of 3 or 6 MHz that need not be contiguous to the existing channels with which they would be associated. Phase 2 also applies to systems that are intended to be introduced through simulcasting on a 6 MHz channel. OET also is working on additional research that will examine the utility of minor modifications to the allotment tables to obtain additional spectrum capacity. Results of this third phase of the study will be released when the work is completed.

62. In large measure the availability of spectrum depends on the locations of existing stations and restrictions on the minimum distance between stations that are necessary to prevent interference.[97] Additional spectrum assignments for ATV systems also would be subject to minimum distance separation requirements, although the distance might differ from that in our existing rules due to factors such as different transmission techniques or service areas of different sizes.

63. The spectrum availability study analyzed the percentage of existing authorized stations, applicants, and permittees that could be provided additional spectrum for minimum separation distances ranging from 190 miles to 100 miles. The distance of 190 miles was selected for the upper limit because it roughly approximates the current NTSC cochannel minimum separation distance.[98] With stations at a minimum separation distance of 100 miles, ATV receivers would be required to operate with much lower D/U signal margins than existing NTSC receivers. Currently, existing NTSC broadcast service extends to at least 40 miles without interference from cochannel stations with present minimum spacing requirements. To provide about the same coverage for ATV stations separated by only 100 miles, receivers would have to be able to operate with a D/U margin of only 6-10 dB rather than the 28-45 dB[99] margin typical of NTSC receivers. This condition may be very difficult for ATV technology to achieve, and shortcomings would result in reduced service areas or fewer than all stations being authorized to broadcast ATV service. Therefore, it was deemed impracticable to study separation distances less than 100 miles. The study also used the current standard of 60 miles for adjacent channel separation distance.

64. For purposes of this description of the studies, the term "existing stations" means: (1) licensed stations; (2) prospective stations with valid construction permits; and (3) pending applications that have been accepted for filing as of June 1988.[100] A computer program based on geographic spacing methods for station assignments was used to assist with the analysis. Heuristic methods that tend to maximize the number of assignments by making the most highly constrained assignments first were applied. For any given station, locally unused channels were treated as candidate spectrum for ATV. The distances to stations that would be cochannel to the candidate ATV spectrum were calculated. Candidate ATV spectrum with cochannel and adjacent channel separations exceeding specified minimum separation distances were identified as potentially available.

65. The study design incorporated several underlying assumptions and limitations. Only co-channel and adjacent channel interference were considered because these were assumed to be the dominant factors limiting additional spectrum use. Assignment taboos that we presently employ to compensate for the performance of existing receivers were assumed not applicable in this analysis. We believe this assumption is reasonable with regard to interference to ATV transmissions because it seems likely that, given present technology, ATV receivers immune to taboo-type interference can be designed and manufactured inexpensively. On the other hand, the degree to which the UHF taboos may be relaxed to accommodate ATV transmissions while NTSC is being used is unclear. This is discussed in the OET Receiver Study, below.

66. The spectrum availability study also did not consider the effect of additional channel assignments for ATV in Canada and Mexico. The availability of spectrum in the United States would be reduced if, as seems possible, Canada and Mexico also were to implement ATV in the current television broadcast spectrum.[101] While the immediate impact would be to stations along the borders, there may be an effect on ATV assignments in other areas. Also, there is an almost limitless combination of ATV spectrum assignments possible and the study only sought to derive general solutions for the assignment of additional spectrum. While the assignments are optimized to a degree, the computer-simulated solutions do not necessarily represent the most efficient assignment of additional spectrum. Further study is required before specific spectrum could be proposed for assignment to stations.

67. The results of the spectrum availability studies are shown in Tables 1 and 2 below. Table 1 summarizes the degree to which stations in the data base could be accommodated nationwide with additional spectrum for ATV in the existing VHF and UHF television bands. The spacings are measured from a hypothetical ATV transmitter to the nearest NTSC transmitter on the same channel. The 100 mile separation distance would accommodate all existing stations operating with ATV using 3 additional MHz. However, this distance could result in ATV service areas much smaller than NTSC service areas. It also assumes

that ATV receivers can operate with significantly lower D/U ratios, as discussed above, a condition that may be difficult to achieve technically. In contrast, only 77 percent of existing stations can be accommodated if 190 mile separation is required. Because the major markets generally have the highest concentration of stations, the greatest problems in accommodating demand for additional spectrum for ATV will occur in these markets; and in these areas the percentage of stations that could be allotted additional spectrum may be significantly less than for the nation as a whole.

68. Table 2 illustrates the problem of providing additional spectrum for ATV in the major markets. The results presented indicate that the percentage of stations that could be allotted additional spectrum in several major markets may be significantly less than for the nation as a whole. While it may be possible to improve the percentage of ATV accommodation in specific markets by using criteria that prioritize assignments in those markets, under any criteria the most difficult problems in accommodating demand for additional ATV spectrum will occur in the major markets.

Table 1: Nationwide ATV Spectrum Availability

Based upon the OET study, this table indicates the percentage of existing stations[102] that could be allotted additional spectrum for minimum co-channel separations of 190 and 100 miles. Also, only adjacent and co-channel restrictions were considered. UHF taboo restrictions were not considered.

Amount of Additional Spectrum (MHz)	Minimum Co-Channel Separation 100 miles	190 miles	Conditions
3	77	22	ATV spectrum contiguous to station's existing channel.
6	63	17	
3	94	50	ATV spectrum in same frequency band, i.e., VHF with VHF, UHF with UHF, not necessarily contiguous
6	84	38	
3	100	77	ATV spectrum anywhere in existing VHF/UHF broadcast bands, not necessarily contiguous
6	98	61	

Note: These results approximate an optimized solution through the use of heuristic techniques that were developed to attempt to accommodate the largest number of stations nationwide.

Table 2: ATV Spectrum Availability in Major Markets

This table illustrates the percentage of existing stations in the top ten markets that could be allotted additional spectrum for ATV use. Results are based on adjacent and co-channel restrictions only. UHF taboos were not considered. The analysis assumes that VHF stations would be assigned supplemental spectrum only in the VHF band and that UHF stations would be assigned supplemental spectrum only in the UHF band.

City	Present No.	Number of Stations Accommodated 6 MHz 100 miles	6 MHz 190 miles	3 MHz 100 miles	3 MHz 190 miles
New York	12	5	0	6	1
Los Angeles	15	9	5	12	5
Chicago	13	9	2	10	2
Philadelphia	10	5	0	6	1
San Francisco	13	8	8	9	8
Boston	10	4	0	7	3
Detroit	7	3	0	4	1
Dallas/Ft. Worth	15	11	9	14	9
Washington, D.C.	10	6	0	8	3
Houston	11	9	8	11	8
Nationwide	1760	1480 84%	673 38%	1655 94%	881 50%

Note: Results are illustrative only. Priority could be accorded the top ten markets without significantly changing the percentage of stations accommodated nationwide, but the availability of spectrum in nearby markets would be affected. For example, if additional stations in the Washington, D.C. market are accommodated, there would be less spectrum available in the neighboring Baltimore and Annapolis markets.

69. *Receiver Study*. Allotment of television channels currently is based on interference constraints that are implemented by requiring a minimum distance between stations. For example, stations using the same channel have to be separated by a certain minimum distance to prevent creating co-channel interference. Minimum separations also apply to adjacent channels since receivers generally are sensitive to signals immediately adjacent to the channel to which they are tuned.[103] In addition, the Commission's UHF allotment scheme also is based upon the characteristics of existing receivers that limit their ability to reject interference from undesired signals on certain other UHF channels. The interference mechanisms that produce this interference involve cross modulation, intermodulation, local oscillator frequency, intermediate frequency (IF) beat, half-IF beat, and image. These interference mechanisms generally result from undesired mixing or combining of signals in receivers. To avoid these limitations interfering with reception, our rules restrict the use of specific channels above and below each alloted UHF channel. These restrictions, known as the UHF taboos, substantially restrict the use of UHF channels.[104]

70. The OET receiver study analyzed the possible impact of ATV use of taboo channels on existing receivers by analyzing UHF immunity data on 15 conventional television receivers. Statistical methods were used to project the results for the existing domestic receiver population. It is important to note that the receiver data was based on NTSC format signals for both the desired and the interfering (undesired) signals. While the actual format that ATV augmentation signals will use is not known, the study assumed that the NTSC format represents a "worst case" interference situation. Therefore, we expect that an ATV signal designed to minimize interference would present less interference potential to conventional receivers than assumed in this study.

71. The results of the receiver study indicate that generally the first through fifth adjacent channels (n + or - 1 or 2, or 3, or 4, or 5) and sound image channels (n + or - 14) appear to be the best candidates for ATV augmentation. The IF beat phenomena channels (n + or - 7 or 8) appear to be somewhat less desirable for this purpose, and the picture image channels (n + or - 15) appear to be the

least desirable. OET plans to conduct an additional study of the interference immunity of conventional receivers that will be based upon a more current sample of receivers.

72. The receiver study also considered the performance of an advanced technology receiver developed several years ago by RF Monolithics, Inc. The study concluded that the interference rejection capability of this receiver is substantially better than that of ordinary receivers, and that future NTSC or ATV receivers that incorporate similar technology would not require the UHF taboos protection.

3. Discussion

73. In considering the spectrum needs of ATV service, we believe it is desirable for all broadcasters to be able to participate in the provision of ATV service. We also believe it is important to avoid, to the extent possible, disruption of the existing broadcast television service provided to the public. We do, however, recognize that for technical reasons these goals may be difficult to achieve and that trade-offs may be necessary in the number of stations that can operate ATV service, the size of the geographic areas served by such stations, and the amount of spectrum available to each station.

74. With these considerations in mind, the studies by the Advisory Committee and our staff and the record developed in this proceeding support several tentative decisions that will allow us to focus our efforts regarding the spectrum to be used for ATV. In this section we address the area of the spectrum to be considered for ATV service, the spectrum plan for individual ATV channels, and our anticipated schedule for future action on ATV spectrum issues.

a. Spectrum To Be Considered for ATV

75. While we desire to authorize ATV service in a manner that would provide opportunity for all existing television stations to participate, based on the findings of the Advisory Committee and OET studies, we are not optimistic that this can be achieved easily. Nevertheless, we have tentatively decided to allot supplemental spectrum only within the existing VHF and UHF television allocation to provide for possible ATV transmissions. We do not intend to consider spectrum outside these bands. There are a number of reasons for this tentative decision, as discussed below.

76. Frequency bands between 1 GHz and 13 GHz have been considered for ATV use. These bands are allocated to a variety of government and nongovernment services. Nongovernment frequency bands in this region are used heavily for broadcast auxiliary, cable TV auxiliary, common carrier, and private microwave fixed services. For each frequency band allocated to the fixed services there are generally between several thousand and upwards of forty thousand licensees or microwave paths. In most instances propagation conditions make it impractical to relocate these services to higher frequencies. Moreover, relocation would involve a severe detrimental impact on existing services, result in enormous expense, and could not be implemented without lengthy delays. The bands between 1 GHz and 13 GHz also are used for a variety of satellite services. The satellite services would experience problems similar to the fixed services if we were to relocate satellite services to other frequencies. An added problem is the time it takes to design, construct and arrange for launch of new satellites. Therefore it would be many years before existing satellites could be replaced and frequencies could be made available for ATV. Working Party 3 of the Advisory Committee's Planning Subcommittee generally arrived at these same conclusions, but identified three frequency bands for possible further examination for ATV: government frequency bands at 4.4-4.49 GHz (4 GHz) and 7.75-7.9 GHz (7 GHz) and the nongovernment DBS band at 12.2-12.7 GHz.

77. The 4 GHz band is allocated domestically for government fixed and mobile services. The government uses this band for high power military tropo-scatter systems intended for battlefield use. In peacetime the frequencies are primarily used for training on these systems. While the Advisory Committee feels this band may be attractive, this raises difficult national security issues and it is highly unlikely that the National Telecommunications and Information Administration would agree to relinquish or share these frequencies. We note there are more than 1300 assignments in this band. At the least, considerable delay would be involved before the frequencies could be made available. The 7 GHz band is allocated to a government fixed service. The Advisory Committee states that the intensity of use is unknown. Our review of this band indicates there are approximately 1000 assignments spread throughout the United States, used for a variety of vital government operations. For example, the Federal Aviation Administration uses this band to transmit remote radar data via microwave links to air traffic control centers. We conclude that there is little prospect that the 4 or 7 GHz bands could provide spectrum for ATV in a timely manner.

78. With regard to the DBS band at 12.2-12.7 GHz, we point out that DBS may be used today for conventional and ATV broadcast services. We note as an aside that the same also is true for the multipoint distribution services (MDS). Although the DBS service does not have any satellites in orbit today, the Commission has granted a number of permits, the permittees have shown due diligence in attempting to get the service in operation, and other parties have applied for DBS authorizations. We are reluctant to disturb the nascent DBS service because of its potential to provide a multichannel television service to rural and underserved areas. Further, the technical problems, described below, associated with the use of microwave frequencies for ATV, are the most severe in the DBS frequency band. We also have considered the possibility of sharing the 12 GHz DBS band with ATV transmissions. However, it does not appear that this is a viable option. Satellite earth-station receivers need to detect weak signals from space and interference likely would occur from the relatively high power terrestrial ATV transmissions.

79. Irrespective of the issues involved in relocating existing services, we believe that there also are significant technical problems with the use of microwave frequencies for ATV. The propagation characteristics of microwave frequencies are not well suited to the reliable wide area coverage that we associate with broadcasting. Microwave signals are subject to shadowing from trees and foliage, obstruction by buildings, and attenuation caused by heavy rain. Line-of-sight paths are required generally. These propagation difficulties become greater at higher frequencies and would be more pronounced in the 12 GHz DBS band as compared to lower microwave bands.

80. There are additional problems with using microwave frequencies for augmentation. A separate microwave antenna would be needed to receive the augmentation signal, in addition to the normal UHF/VHF antenna. Further, transmitting augmentation signals on so widely separated frequencies as VHF and 12 GHz does not appear to be technically or economically feasible.

81. With regard to the availability of spectrum in the existing VHF and UHF bands, the studies indicate that an ATV system suitable for this purpose will have to be designed (1) to not be susceptible to NTSC UHF taboo interference,[105] and (2) to be both less susceptible to NTSC interference and not cause interference to NTSC stations at distances significantly less than those at which NTSC stations interfere with each other. As indicated above, we believe these assumptions to be technically feasible. Therefore, in considering authorization of systems that require supplemental spectrum, we will favor systems that are capable of operating within these constraints. This is not to minimize the practical difficulties that may be encountered as ATV systems are developed and implemented, but rather, to recognize the severe spectrum constraints that exist. We believe that interested parties should plan for and design systems capable of working within the limitations discussed above. We request comment on these conclusions, and if parties disagree with our conclusions, we request a detailed explanation for their positions and analyses of feasible alternatives.

b. Spectrum Assignment Options

82. We intend to analyze ATV spectrum plans in terms of accommodating as many existing broadcasters as possible and encouraging the most intensive and efficient use of the spectrum. In view of the opportunity costs associated with spectrum used for ATV service, our preference is for ATV systems that can provide satisfactory service using the least spectrum. Because spectrum available for ATV use in the VHF and UHF broadcast bands is limited, we tentatively have concluded that we will consider only those plans that would use 6 MHz or less of additional bandwidth per station. Even if it were possible to eliminate or substantially relax the UHF taboos in an ATV environment and ATV receivers could handle signals with lower D/U ratios, authorization of supplemental spectrum in excess of 6 MHz would be undesirable because it would limit the number of stations that could be accommodated. Another element of our tentative decision is to maintain service to existing NTSC receivers, at least through a transition period, and therefore we do not intend to authorize ATV service that would result in a reduction to NTSC service. We propose requiring licensees to transmit an ATV signal that is compatible with NTSC receivers or to simultaneously transmit NTSC and ATV signals on dual channels. Therefore, any NTSC incompatible system that uses more than 6 MHz, such as the MUSE HDTV system, would not be a candidate for authorization.[106] We invite comment on these tentative decisions.

83. There are four basic options within the range of our tentative decision on spectrum: 1) no additional spectrum allotment; 2) 3 MHz of additional spectrum not necessarily contiguous to augment existing 6 MHz channels; and 3) 6 MHz of additional spectrum not necessarily contiguous for augmentation of the NTSC signal; 4) 6 MHz of additional spectrum not necessarily contiguous for transmission of a non-compatible ATV signal. We invite interested parties to comment on all aspects of these options. In particular, we seek information on service quality, equipment costs and other economic impact elements, and implications for spectrum efficiency.

84. Limitation of ATV systems to the 6 MHz bandwidth currently provided for television channels effectively would require that ATV systems be fully compatible with the NTSC system. As discussed in the comments and the economic analysis of the Advisory Committee, compared to other ATV alternatives, a 6 MHz compatible ATV system is expected to have only a relatively small economic impact on broadcasters, cable operators and consumers. Such a system would not require broadcasters to replace or add transmitters, nor would it require cable operators either to expand channel capacity or to discontinue any existing service. Existing receivers would be unaffected by the new signals and new ATV receivers would be able to process either NTSC or ATV signals. Limitation of ATV service to the existing 6 MHz channel also would permit future assignment of additional full service television stations, would not displace LPTV and TV translator stations that operate on a secondary basis, and might provide opportunity for additional non-broadcast use of the UHF band.

85. As was the case with color television, broadcasters' use of new, fully compatible technology likely would encourage the development and marketing of new receivers. High demand for ATV receivers, which reasonably could be expected with a fully compatible system, would allow manufacturers to quickly achieve economies of scale in production that would lead to lower prices for consumers. The availability of ATV programming for broadcasters and sales of ATV receivers likely would accelerate as broadcast stations and cable systems implemented ATV hardware. Thus, we believe that the transition to ATV might occur more rapidly than otherwise if a 6 MHz NTSC compatible ATV transmission option were implemented.

86. We recognize that the quality of ATV service that could be provided with a 6 MHz system may not be as high as that which might be possible with other system designs that use more bandwidth. At this point, the degree of qualitative improvement associated with systems that use greater bandwidth and the value consumers place on these improvements is not known. Thus, it is not clear whether broadcasters can remain competitive in the long run with the service quality attainable through a 6 MHz NTSC compatible ATV system.

87. Under the 3 MHz supplemental spectrum approach, an additional, not necessarily contiguous, augmentation channel would be authorized for ATV signals. A station would continue to transmit NTSC signals on its primary channel, and the 3 MHz augmentation channel would be used only by ATV receivers.[107] The primary desirable feature of this approach is that it likely would provide better ATV quality and facilitate an orderly transition to ATV service by maintaining compatibility with NTSC receivers. As indicated by the OET spectrum study, it also appears that a 3 MHz spectrum plan could accommodate more stations than a 6 MHz plan.

88. The expected improvement in service quality from use of the additional bandwidth would not be realized without costs, however. Broadcasters would incur the expense of additional transmitters, and cable operators would need to purchase new equipment or modify existing equipment to carry ATV signals and, in general, would have to either increase their channel capacity or eliminate some existing services. In addition, use of additional spec-

trum might necessitate a significant reduction in the ATV service areas of many television stations, with the greatest reductions occurring in large cities, where station density is greatest. Use of a supplemental spectrum approach also would lock in the inefficiencies of NTSC for longer than a system not compatible with NTSC. Finally, assigning supplemental spectrum may be complex and costly, and it is not clear that successful ATV operation is technically feasible where there are large differences in frequency between the primary and supplemental channels. This may operate to the disadvantage of stations operating on the lower VHF channels.

89. Authorization of a supplemental 6 MHz would result in two possible ATV implementation scenarios. One would be to transmit augmentation signals. The advantage expected over a 3 MHz system would be greater improvement in service quality. The disadvantages of employing augmentation spectrum described above also apply. The other approach would be to use the 6 MHz to broadcast in tandem the signal of an independent, incompatible ATV system with the NTSC signal on the station's primary channel.[108] This might be desirable because after a transition period broadcasters could shift ATV transmissions to their primary channel and abandon NTSC transmissions if ATV receivers have sufficiently penetrated the market. Ultimately this would allow broadcasters to restore service areas to those under the existing allotment system. While we would expect broadcasters eventually to convert to ATV service, this option also would allow them to cease transmitting ATV service and continue to transmit NTSC service if sufficient demand for ATV does not develop. This process might be a way to implement ATV service relatively quickly with technical advantages that might be obtained from a system that need not be compatible with the NTSC system. If there were continuing demand for both NTSC and ATV service, broadcasters might operate both indefinitely. However, that would eliminate the spectrum efficiency benefit of ultimately regaining one of the two 6 MHz channels for other use. Parties addressing the simulcast approach are asked to comment on the likelihood of this occurring and its implications for spectrum efficiency.

90. The 6 MHz supplemental spectrum option generally is subject to the same types of costs and limitations as those of the 3 MHz option. However, as indicated by the results of the OET spectrum study, fewer existing broadcast stations could be accommodated with 6 MHz than with the 3 MHz option, with the greatest limitations occurring in the major cities. We seek comment on the desirability of authorizing 6 MHz of supplemental spectrum for ATV service and the effects this authorization might have on broadcasters, cable systems, consumers, and spectrum efficiency.

91. Assuming that use of more bandwidth permits transmission of better quality signals, we must compare the costs and benefits of using the spectum for enhancing television performance with increasing the number of NTSC stations or authorizing other competing uses for the same spectrum. The Advisory Committee is planning to assess the quality and economic impact of the various proposed systems. A framework for this analysis is contained in the Interim Report. In its report, the Advisory Committee's Planning Subcommittee Working Party 5 states that although it is not feasible to apply a complete quantitative cost-benefit analysis of policy decisions regarding ATV, the full enumeration of the direct and indirect costs and benefits and identification of those who gain or lose under each policy alternative should be analyzed.[109] We request comment on the costs and benefits of implementing ATV under the various spectrum options.

92. The OET study indicates that it may be possible to provide 3 MHz or even 6 MHz of additional spectrum to many authorized broadcast stations if the UHF taboos can be disregarded and more stringent interference protection criteria can be satisfied. However, it may be difficult or impossible to provide supplemental spectrum to all existing stations as presently allotted in a few of the most densely populated metropolitan areas, such as New York, Los Angeles, Philadelphia, Detroit and Washington, D.C. Therefore, it may be desirable to consider limited channel reassignments for a small number of stations if that would allow us to provide ATV spectrum to more stations than otherwise possible. Any such minor rearrangement of channel assignments would be designed not to significantly change the coverage area of the affected stations. We anticipate that generally such changes would involve changing a station's frequency by the least possible amount.

93. OET plans additional research to study the feasibility of such minor modifications to our Table of Allotments to determine if relatively minor changes would accommodate stations that otherwise might be unable to obtain additional spectrum. We ask for comments on the desirability of such an approach, how the costs might be apportioned, and on whether there are other ways to deal with the possible provision of supplemental spectrum if we conclude that we cannot satisfy every station in major urban areas.

c. Timetable for Future Action

94. We intend to conclude our technical analyses quickly, to develop a variety of channel assignment plans, and to present these plans for public comment as expeditiously as possible. At this juncture, we see little benefit in deferring spectrum decisions until we reach a decision on technical standards issues. We see benefits to proceeding rapidly. Inasmuch as the present allotments limit the amount of spectrum capacity available for assignment, proposing band plans early in the process will identify real design constraints that may both narrow the number of systems under consideration and assist system designers to develop ATV formats that can be used under actual broadcast conditions. Also, determining whether there will be supplemental assignments and, if so, the viable set of such assignments may permit relaxation of our freeze on television allotments and assignments.

95. In summary, we request comment on the availability and use of spectrum for ATV as discussed above. In addition to our tentative conclusions, parties should address any other relevant issues involving spectrum availability and use.

C. *UHF Freeze and Private Land Mobile Sharing*

96. We have considered methods to amend or repeal either the UHF freeze or our deferral of action in the proceeding that considers additional sharing with the private land mobile radio service (PLMRS)[110] but have concluded that taking any action at this time would be premature because inevitably it would affect the options available for providing ATV service within the existing broadcast allocations. Therefore, although we wish to re-

solve these issues as soon as possible so that spectrum can be utilized to provide service to the public, we are unable to do so now. However, as discussed herein, we intend to conclude our technical analyses and develop a variety of channel allotment plans. Once these plans are adopted, we will be in a position to relax or repeal the television freeze and to assess the public interest utility of the PLMRS sharing proposal.

D. *Relay Services*

97. If broadcast ATV utilizes a bandwidth greater than 6 Mhz, there may be a need for additional spectrum for ATV signals to be distributed to stations via satellite, for studio to transmitter links (STL), and for TV pickup and cable relay services (CARS).[111] Since successful implementation of a wideband ATV system may depend upon modification of the existing signal delivery systems, we seek comment on the adequacy of the existing allocated bands used to deliver television signals and the ability of current delivery mechanisms to handle ATV signals.

98. As an initial matter, it appears that satellite delivery to stations and cable systems could be accomplished employing either the Fixed-Satellite Service (FSS) or the Broadcasting-Satellite Service (BSS). Working Party 4 of the Advisory Committee's Planning Subcommittee opined that the excess of FSS spectrum-orbit supply over demand will continue for some time. If there is excess capacity in the FSS, fixed satellite distribution of ATV signals with a baseband greater than 6 MHz would be feasible.[112] C-band satellite transponders used for video distribution generally are available in 36 MHz increments[113] which, employing FM modulation, could provide a high quality distribution signal for a 9 MHz baseband ATV terrestrial system. A 12 MHz system, however, might require the wider channels available at Ku-band.[114] The BSS will employ the 12.2-12.7 GHz band. Although internationally it is planned to accommodate 24 MHz transponders, it could accommodate wider bandwidth channels since no U.S. DBS satellite has been launched yet.[115]

99. The existing STL and TV pickup links generally employ the 2 and 6 GHz bands, using FM modulation in 17 and 25 MHz channels, respectively. Working Party 3 of the Advisory Committee suggested that these bands may require wider channels for ATV, which would result in correspondingly fewer channels being available.[116] We note that using FM modulation, a 25 MHz channel might be adequate for a 9 MHz ATV signal, and therefore no change may be necessary in the 6 Ghz band. Also, digital modulation systems might improve usage. Higher bands such as 17.705-18.135 GHz also are available and less congested, so it may be possible to stack existing channels or rechannelize to permit ATV use. However, this approach may not be practical for the longer STL links because more hops would be required than at 6 GHz, due to the greater attenuation experienced at higher frequencies.

100. Since the bands available for STL, TV pickup and CARS operations already are highly congested in some urban areas, we seek comment on whether they are sufficient to accommodate ATV and suggestions for increasing their capacity. Also, we solicit comment on methods to accommodate wider bandwidth ATV signals within the existing bands, the technical feasibility of employing the higher microwave bands to satisfy auxiliary broadcasting requirements for ATV in areas of high spectrum occupancy, and the costs associated with doing so. In addition, we solicit comment on any additional alternatives, including 1) suggestions for any additional frequencies that may be used and 2) the availability and practicality of utilizing non-spectrum technologies and services such as those provided by wireline common carriers for these purposes.

101. Cable system signal distribution also will be affected by wider bandwidth ATV. In the most heavily used CARS band, at 12.7-13.2 GHz, usage consists primarily of amplitude-modulated links (AML) relaying blocks of 6 MHz NTSC television channels. The report of the Advisory Committee's Planning Subcommittee Working Party 3 on Spectrum Utilization states that additional spectrum would be necessary to carry the greater bandwidth of ATV signals.[117] The report of Planning Subcommittee Working Party 4 estimates that an AML transmitter retrofit to support transmission of wider bandwidth ATV signals would cost approximately13,000 per channel.[118]

102. Comment is requested on this conclusion, on the feasibility of using allocated bands higher in the spectrum at 17 GHz and 19 GHz, and on other related problems and solutions. We also seek comment on the implications for the satellite services of wider bandwidth ATV signals that would have to be distributed to both broadcast stations and cable systems.

E. *Border Areas*

103. Television signals broadcast in border areas are subject to bilateral agreements with Canada and Mexico. In the case of Canada, the border area is defined as the area within 400 km of the boundary.[119] The border area with Mexico is defined as being within 400 km of the boundary for VHF and 320 km for UHF.[120] Since these agreements are based upon the existing 6 MHz channelization scheme, it will be necessary to enter into discussions with Canada and Mexico to provide for the implementation of ATV within the border areas if, in the view of either signatory, the technology requires different interference considerations than those provided by the agreements. In particular, we note that the treaties not only incorporate tables based upon the existing 6 MHz channelization scheme, but also provide for employment of offset carriers to reduce interference. Use of the presently allocated broadcast spectrum within the border areas as defined by the agreements will require discussion between the governments involved, particularly if spectrum is reassigned, or if ATV systems employ different carriers or other changes to current standards that would increase the potential for interference. We note that Canada and Mexico have shown interest in ATV.[121] We look forward to the reports of both the Planning and Implementation Subcommittees on this matter. The former group is planning to perform the computer planning studies, and the latter group is planning to evaluate the effect of ATV implementation on U.S. treaty obligations.

104. On the Canada/U.S. boundary, the close proximity of cities is of particular note. The existing agreement provides for locating stations at less than the minimum agreed co-channel separation, so as to provide an adequate number of stations for nearby cities of each country. The Working Arrangement, *supra*, considers that objectionable co-channel interference would exist only when the F(50,10) field strength values at the protected contour exceed the appropriate maximum F(50,10) field strength given in Table I of that Arrangement. Table I provides a D/U ratio of 9-18 dB for different specified channels employing offset carriers. Since the nominal value of D/U expected using offset carriers is 28 dB, the effect is to

reduce service distance in the various cases so as to permit location of co-channel stations closer together. This provision has enabled both countries to satisfy their requirements in the border area.

105. We request comment on the specific application and effect of these Agreements under the possible ATV scenarios. We also request analysis of the interference potential of the proposed systems as related to the obligations of the United States under these bilateral agreements, suggestions for how the interference potential might be minimized, and how this may be accomplished for each of the proponent systems.

IV. ATV STANDARDS

A. *Introduction*

106. Technical standards in broadcasting, such as the NTSC standard for television signals,[122] have been established in order to ensure compatibility between transmission and reception, to control interference, to facilitate efficient spectrum use, and to ensure signal quality. In this section we consider the following issues related to establishment of ATV standards: (1) whether the existing NTSC standard should be relaxed or repealed; (2) how standards should be established for ATV; and (3) whether it would be desirable to require compatibility between ATV broadcast transmissions and other ATV distribution media, such as cable and videocassette recorders.

B. *Relaxation or Repeal of the NTSC Standard*

1. Positions of the Parties

107. In the *NOI* we solicited comment on whether the NTSC transmission standard should be relaxed or repealed to facilitate the introduction of ATV systems. The comments in general oppose any modification of the NTSC standard. MST states that alteration of the NTSC standard would be premature and unlikely to facilitate the introduction of ATV service because ATV systems are not fully developed, but only have operated on an experimental basis.[123] According to MST, the results of testing and evaluation now underway will assist in determining whether new standards are desirable and, if they are, the characteristics that should be included. NAB adds that the Commission's rules provide for experimentation without relaxing the generally applicable NTSC transmission standard through special temporary authority or experimental authorizations under Part 74, and that amendment of the NTSC standard on an as needed basis to accommodate a particular system would provide a more orderly transition than a general relaxation.[124] GE also opposes modification of the standard, and warns that poor television receiver performance might result if the NTSC standard were relaxed or repealed because receiver designers would be unable to anticipate the conditions under which new receivers would be required to perform.[125]

108. NYIT states that ATV undoubtedly will require modification to the NTSC standard, but that changes should be made only if they do not degrade reception by NTSC receivers, are agreed to by the broadcast industry, and are not mandatory.[126] RTT also favors relaxation of the NTSC standard, at least to the extent necessary to allow implementation of its T-NET system, which it claims permits one-way communication between subscribers and stations. RTT argues against freezing the development of television technology while ATV systems and standards are developed.[127]

2. Discussion

109. We agree with most of the commenting parties that because ATV systems still are in the developmental stage, little would be gained by eliminating or relaxing the NTSC standard at this time. However, we do find it in the public interest to develop an interim policy to consider requests for waivers of the NTSC transmission requirements for the purpose of broadcasting ATV signals.[128] We intend to act on such requests expeditiously, provided that they meet the following conditions: (1) the public's reception of existing stations will not be impaired; and (2) interference to other stations will not exceed that caused by the station's present NTSC operations. If these conditions are not demonstrated, we will require a complete explanation of any interference expected and why grant of the requested waiver would further the public interest. Comments are requested on this decision and on the proposed waiver criteria.

C. *Establishment of ATV Standards*

1. Positions of the Parties

110. The comments indicate that broadcasters prefer that the Commission select a single mandatory ATV transmission standard. NAB agrees that standards are necessary, but recommends that we endorse a standard chosen by industry rather than formulate a standard on our own.[129] GE argues that the Commission must take a leadership role in establishing a standard because not to do so could be confusing, reduce the rate of ATV implementation, or even result in consumer rejection.[130]

111. MST states that compatibility with existing NTSC receivers should be an important part of a standard, but that too little technical information is available on ATV transmission methods to select a particular standard at this time.[131] SBCA also states that it would be premature to set standards at this time.[132] NTIA argues that to avoid a protracted struggle over standards we should pick a standard within three years that is as spectrum efficient as possible.[133] NTIA proposes that we compare the quality of various systems but rely on industry thinking in selecting ATV standards.

112. Other commenters point out disadvantages of government standards-setting for ATV. Neuman emphasizes the delay inherent with government regulation, and proposes as an alternative industry negotiation and agreement without our formal adoption of standards.[134] Similarly, SBCA argues that the market should be as free of standardization as possible to allow consumers to be the ultimate decisionmakers and suggests that standardization may limit innovation and creativity, prevent development of the best possible system, and result in higher costs.[135]

2. Discussion

113. While we agree that it is premature to adopt an ATV standard at this time, we also believe that the public interest compels a Commission role in the development of standards with the advice and involvement of all sectors of the industry. Establishing standards has the advantage of pointing the various interested parties -- researchers, equipment manufacturers, broadcasters, networks, and

program producers -- in the same direction and reduces the risk to both audiences and broadcasters of investment in an ATV system that might become obsolete if a different system is introduced in the market. Thus establishing a standard may overcome audiences' and broadcasters' reluctance to invest in ATV technology by increasing the amount of programming available to audiences and ensuring that receivers will be compatible with broadcast signals. Standards also may increase demand for equipment, leading to economies of scale in equipment manufacture that will lower costs to the public.

114. The characteristics of a well defined emission standard also can be used as assignment tools to provide greater opportunities for efficient spectrum use. For example, even though our NTSC interference protection criteria are based on a nominal 45 dB desired to undesired (D/U) ratio, by taking advantage of the structure of the NTSC signal we found that offsetting frequencies of co-channel stations by 10 kHz permits protection ratios to be reduced to 28 dB D/U without reducing reception quality. Options for dealing in a similar manner with the additional interference caused by transmitters operating on supplemental spectrum might be reduced if different ATV systems exist, since establishing standard offset carrier frequencies would not be possible. Given the apparent difficulty of providing supplemental spectrum to all licensees, this is an important consideration. However, this would not necessarily be our conclusion for all types of ATV systems. Achieving spectrum conservation through setting technical standards may depend upon the technology chosen.

115. Despite these advantages, detailed, inflexible standards that have the force of law may reduce consumer choice and prevent the timely introduction of new technology. We do not believe that any action we take should preclude the future improvement of ATV systems nor discourage the development of newer and technically superior ATV systems. We concur with the report of Working Party 5 of the Advisory Committee's Planning Subcommittee that "[if] there is a general prescription for agency involvement, it would be to preserve flexibility in the standard setting process to the greatest extent possible."[136] Accordingly, we wish to consider ways in which flexibility for such future improvements can be taken into account.

116. One alternative that would allow more flexibility than adopting a single mandatory transmission standard would be to protect a standard by prohibiting interference to systems using that standard, but not requiring use of that standard. An advantage of protecting certain key aspects of a standard, rather than making all aspects of a particular system mandatory, is that this action would ensure that the system could be widely broadcast and received but also would permit development and use of competitive systems that might provide superior features or lower cost. Protecting a standard, but not requiring its use, may encourage the industry to coalesce around a single system without creating inflexible requirements that prevent the development of newer, technically superior systems. For example, this approach was utilized in protecting the pilot tone of the Broadcast Television Standards Committee (BTSC) MTS system.[137] There may be features of ATV transmission that similarly can be protected and that would permit adoption of improved or different systems without the need for regulatory action to approve changes in the standard.[138]

117. A variation on this alternative would be to adopt a standard for allocation and assignment purposes only, rather than mandating it as the only allowed standard. Such an approach would encourage industry participants to adopt the standard, but would retain flexibility for industry participants to modify their ATV systems in the future if alternative and superior systems are developed.

118. An additional option would be to adopt a sunset provision making adherence to the standard optional after an established period. A limited- duration standard would serve the purpose of assuring compatibility among ATV systems during the early stages of ATV implementation, but would facilitate introduction of improved technologies at a later date.

119. In light of the fact that many of the advantages of compatibility standards diminish if standards conversion costs are low, we also wish to examine the feasibility of the development of an "open architecture" receiver (OAR) as suggested by Schreiber and Neuman at MIT. These parties argue that inasmuch as all ATV receivers necessarily will be capable of decoding two standards (NTSC & ATV), the cost of providing for reception of more than two standards would be quite low.[139] We recognize that concerns of cost and complexity have been raised by some commenters with regard to the open architecture receiver.[140] Nevertheless, if such a receiver were technically and economically practicable, the concept may allow more flexibility in the development and provision of ATV service. At this stage, however, the arguments on this issue are not well developed. In particular, we seek information on the projected cost of different receiver architectures and the projected cost of an OAR.

120. An important issue is determining the optimum time for adopting standards. It appears that in view of the rapidly changing technology in this area, adopting standards too early might result in widespread implementation of an inferior system. On the other hand, lack of accepted standards might slow broadcast ATV implementation. We request comment on the events we should use as benchmarks to determine at what point in ATV development adoption of standards would be desirable.

121. Although we intend to have a role in the ATV standards-setting process, the resources and expertise of industry will be crucial to the successful development of these standards. Therefore we encourage continued industry participation in the Advisory Committee and voluntary standards organizations such as the American National Standards Institute (ANSI), the Advanced Television Systems Committee (ATSC), and the Electronics Industry Association (EIA). We believe that these efforts will contribute materially to the information necessary to make an appropriate decision in this matter.

122. In addition to the matters discussed above, we request comment on the following:

(1) Is it in fact desirable for us to establish a standard for ATV transmission systems? If so, would it be desirable to establish a single ATV standard or would more than one standard be preferable?

(2) Is our judgment correct that it is too early to adopt transmission standards? How should we determine the appropriate time to establish an ATV standard if we decide to do so? If parties agree that it is too early, we ask for comments and suggestions

concerning benchmarks by which we might determine when it would be appropriate to adopt standards.

(3) What reasons are there to expect that, in the case of ATV, an industry *de facto* standard will become established in the absence of Commission action? What is the likelihood that a *de facto* standard will be the most desirable choice? Under what circumstances, if any, might a *de facto* standard fail to serve the public interest? What might the consequences be?

(4) If we desire to encourage the establishment of one or more ATV standards, would it be preferable to adopt them as recommendations rather than mandatory standards? What are the advantages and disadvantages of protecting key aspects of a system from interference rather than complete systems? What characteristics of an ATV system would it be appropriate to protect?

(5) What are the advantages and disadvantages of an Open Architecture Receiver approach? If there are alternative ATV systems and no individual system is clearly superior, would an Open Architecture Receiver approach be preferable to standards-setting?

(6) What are the advantages and disadvantages of limiting the duration of a mandatory standard? What would be an appropriate duration?

D. *Compatibility with NTSC Receivers*

1. Position of Parties

123. Nearly all the commenting parties express the belief that compatibility of ATV signals with NTSC receivers is desirable. MST, GE, and NYIT, for example, state that compatibility should be an important criterion in evaluating any ATV system.[141] NAB and NTIA both stress that broadcasters must be allowed to continue service to current viewers.[142] But MST also stresses that the options of using simulcasting and inexpensive converters should be retained. Similarly, SBCA states that compatibility is desirable but need not necessarily be a requirement.[143]

2. Discussion

124. An ATV system that uses supplemental spectrum may achieve compatibility by transmitting an NTSC signal on one channel and detail information on supplemental spectrum. Compatibility also is possible for 6 MHz ATV systems if information is added to an NTSC signal that would not be noticeable on the screen of an NTSC receiver, such as by sending detail information in quadrature to the NTSC signal. Alternatively, with 6 MHz of supplemental spectrum NTSC service may be maintained by simulcasting an NTSC signal and an incompatible 6 MHz ATV signal.

125. Above we have discussed the issues surrounding any requirement that transmissions meet particular compatibility standards. Nevertheless, in the case of NTSC compatibility we believe that maintaining existing service is extremely important, and that the public interest would be served by avoiding any substantial dislocation of existing television broadcast service. We view with concern any situation that results in a substantial short-term reduction in service to owners of NTSC receivers. Such reduction in service might occur *if* stations switched from NTSC to an ATV format that was incompatible with or poorly displayed on NTSC receivers. Accordingly, while it is possible that broadcasters themselves would decide to provide NTSC compatibility, we believe it desirable to require that ATV signals either be compatible with NTSC receivers or that ATV broadcasters simulcast an NTSC signal with their ATV signal, at least for an initial transition period.

126. In this regard, we request comment on the following:

(1) Would the broadcast industry provide NTSC compatibility without our requiring it?

(2) If we require that an ATV signal also be receivable on an NTSC receiver, would we need to specify the quality level of the NTSC picture? If so, what are the various methods by which this could be accomplished? How long should such requirements be maintained?

(3) If ATV-to-NTSC converters could be built and sold at low cost, would there still be a need for us to require that ATV signals be directly receivable on NTSC receivers? If so, how long should such provision be required?

E. *Compatibility With Alternative Media*

1. Positions of the Parties

127. With regard to compatibility with alternative video media, such as cable, satellite service, or videocassette recorders (VCRs), the commenters generally state that compatability is desirable. NA Philips states that NTSC compatibility is preferable to using adapters in receivers or VCRs because they would be impractical, too expensive, and likely to chill product innovation. NA Philips also states that basing future ATV systems on a common standard would assist in achieving compatibility among various possible delivery systems.[144] MST agrees, stating that producers, delivery systems, and the public all have an interest in developing an ATV system that will not require costly conversions that could degrade program quality or impose barriers to carriage.[145]

128. The Advisory Committee Working Parties have been considering the likelihood that the economically optimal ATV transmission method may be different for different transmission media.[146] In particular, Working Party 5 of the Planning Subcommittee suggests that different media are likely to choose different systems due to different tradeoffs between bandwidth and picture quality and different impacts of compatibility with NTSC for different transmission media.[147]

129. Some commenters discuss methods of achieving compatibility. Time considers ATV system conversion to a common baseband signal to be greatly preferable to conversion to a common denominator TV system.[148] GI supports the specification of a common baseband component signal so that manufacturers can design cable TV converters and satellite TV receivers to supply these signals to a monitor with an appropriate input. GI argues that this capability will eliminate the costly process of transcoding ATV signals from one format to another, and that the use of an unmodulated baseband signal will minimize degradation of the signal caused by modulating the signal to RF and then passing it through the tuner.[149]

130. The Advisory Committee Interim Report expressed support for component video inputs.[150] Working Party 1 of the Advisory Committee's Planning Subcommittee recommends that all ATV receivers be required to have some form of multisync capability and component signal inputs.[151] Working Parties 4 and 5 urge that specifications of a Baseband Component Video signal (BCV), such as RGB with digital sound, be developed as a lowest common denominator signal for standard interconnection of various feeder and distribution systems.[152] Working Party 5 of the Planning Subcommittee estimates that the cost of BCV capability will be20 or less per receiver in large-volume production.[153] A contribution by HBO (Kelly) to the work of Advisory Group 2 suggests that initial multistandard capability can be achieved at reduced cost by including RGB and digital sound inputs in the receiver.[154] The EIA has adopted as an interim voluntary connection standard the Multiport Standard (EIA IS-15) to provide a standard baseband (audio and video) interface between NTSC television receiving devices and peripheral devices.[155] The Multiport Standard will support Y/C, Color Difference, and RGB inputs. This indicates the efforts underway to effect voluntary standardization of connectors to support a BCV input in receivers.

131. Schreiber states that an Open Architecture Receiver (OAR) would make signal compatibility unnecessary because it could be adapted to a range of ATV transmission formats without obsolescence and without set-top converters, and could be interfaced with alternative media peripheral devices using its own computing power to facilitate the interconnection.[156] Such an approach could use programmable digital signal processing to receive different types of signals. However, EIA, a recognized standards-setting body under the American National Standards Institute (ANSI), and a number of other parties object to the OAR concept, arguing that it would raise production costs, increase complexity, confuse consumers, and thus delay the introduction of ATV.[157]

2. Discussion

132. While the present array of video distribution media such as cable, VCRs, and satellite receivers use a variety of intermediate encoding standards, they all interface with a standard 525 line/59.94 field display through either a baseband or RF NTSC-like signal. Therefore there may be a commonality of interest among all industry participants to achieve interoperability among alternative distribution media. Manufacturers may have the incentive to provide for interoperability by providing for a common baseband signal or by other means. Likewise, service providers will be interested in attaining the largest market possible, a goal that may be made more achievable if a high degree of interoperability is provided.

133. Moreover, inasmuch as, at least initially, non-broadcast media will continue to require interface equipment such as cable converters and satellite receivers, it appears as if interoperability can be achieved easily and inexpensively without promulgating mandatory standards for these devices. In view of all of these factors, it is our tentative view that ATV compatibility among alternative media also may develop in an appropriate manner without government involvement. In any event, it is too early in the process for any problems to be apparent. We do not intend to retard the introduction of ATV on non-broadcast media, nor do we intend at this point to require compatibility among the various media or set specific signal or equipment standards for this purpose.

134. We seek comment on the following issues:

(1) Is compatibility among media using ATV signals in the public interest? What are the advantages and disadvantages of compatibility?

(2) If compatibility is in the public interest, should it occur through voluntary standards established by industry standards groups or through Commission action? If the Commission is to be involved, should we mandate a standard or only recommend one? What are the costs and benefits of a voluntary industry standard relative to a regulatory requirement?

(3) Do relevant voluntary standards exist in addition to that of EIA IS-15? If so, what are they? Is an Open Architecture Receiver a viable alternative to a voluntary standard? What would be the benefits and the costs of such a receiver? We are interested in details of such voluntary standards as well as any information on the effectiveness of such an approach.

(4) Do we have legal authority to adopt compatability standards for non-spectrum-using media such as videocassette recorders?

V. ALLOTMENT AND POST-ALLOTMENT ISSUES

A. *Introduction*

135. Our goal is to ensure that the opportunity to provide ATV service will be meaningful and will not be encumbered with unnecessary regulatory delay that would disadvantage broadcaster plans to provide ATV service and the public interest in rapid and efficient implementation. Allotment and post-allotment policies to govern the distribution and use of spectrum suitable for ATV service raise a number of issues. In this section we consider the policy and legal issues related to the manner in which this additional spectrum should be allotted or otherwise distributed. Additionally, we address issues concerning use of the spectrum during a transition period and methods of enhancing the ability of broadcasters to move into an ATV environment. We tentatively conclude that there are substantial technical, legal, and policy reasons for us to permit existing licensees to provide ATV service.

B. *Eligible Applicants*

136. Our objective is not to launch a new and separate video service, a context in which it ordinarily would be reasonable to entertain competing applications. Rather, our goal is to encourage beneficial technical change in the existing terrestrial broadcast service by allowing broadcasters to assimilate ATV technology. Thus our intent is to preserve and improve the existing broadcast service and the benefits that this service delivers to the public. In addition, given the risks inherent in ATV, it appears to us that rapid development of ATV broadcasting can be realized best by assigning suitable additional spectrum to existing licensees and applicants because of the considerable resources and expertise that licensees already have

invested in the broadcast television system, and the possibility that additional spectrum could be used only by them.

137. At least initially it is our view that nothing in the public interest standard of the Act requires or suggests that transition to an improved broadcast service must, or should, be accompanied by major changes in the industry's ownership structure. Similarly, our initial view is that authorizing existing licensees to use additional spectrum in order to provide ATV service would not conflict with the holding of the Supreme Court that granting an application for a broadcast license that is mutually exclusive with another, without considering the merits of the other application at the same time, deprives the other of an opportunity for a hearing guaranteed by Section 309 of the Act.[158] The Court itself noted that the Commission could promulgate regulations limiting the class of competing applicants eligible for comparative consideration,[159] and therefore its opinion has not been read to require that interested parties be afforded an opportunity for a comparative hearing in all cases. While the Commission must make a choice among eligible mutually exclusive applicants, we have discretion to determine by rule the circumstances under which applications are considered mutually exclusive.[160]

138. In suggesting this approach, we note that we have declined to entertain competing applications in other contexts when we have found it to promote the public interest, such as when we authorize significantly expanded use of existing broadcast facilities for nonbroadcast purposes without regard to whether the use enhances or is related to main channel service already being provided,[161] when we precluded the filing of competing applications against certain applicants proposing to change channels to provide domestic one-way paging service,[162] and when we reserved one block of cellular spectrum exclusively for wireline carriers.[163] We particularly request comment on our legal authority to limit eligibility to existing broadcasters if we decide to make 6 MHz supplemental allotments that could be used for an incompatible ATV transmission service. In that case there might be legal and policy reasons to accept applications from other parties proposing to provide their own 6 MHz television service. We also ask the Advisory Committee to address this issue. We seek comment on our legal analysis and these initial conclusions.

C. *Allotment Methodology*

139. If additional spectrum is required for ATV and it appears feasible to use existing VHF and UHF spectrum, our preference is to distribute it in an allotment Rule Making proceeding in which supplemental spectrum would be associated with existing channels.[164] We recognize that several practical difficulties will arise in alloting supplemental capacity. The potential service area of ATV supplemental spectrum will depend on local circumstances, primarily the presence of NTSC stations and other ATV allotments. Some allotments may be constrained to a service radius of, hypothetically, 20 miles; others may extend to 60 miles or more. The supplemental spectrum also will occupy different positions in the VHF and UHF broadcast bands. Within a market some of the available spectrum may be close to existing NTSC allotments in frequency while other spectrum may be many channels apart. Also, within some crowded markets the amount of available supplemental spectrum may be less than that required to supplement existing NTSC allotments, particularly if the supplemental spectrum required is 6 MHz. For example, Table 2 shows that the 12 New York City stations may only receive 5 supplemental allotments under one scenario. Also, in some markets it may prove impossible to provide all existing VHF stations with VHF supplemental allotments. Therefore some VHF stations either may be matched with supplemental UHF spectrum or may not be assigned any supplemental spectrum.[165]

140. Three allotment schemes appear possible. Under the first approach the Commission would specify the criteria for determining the suitability of spectrum for ATV. An interested party would apply these criteria to its particular circumstances, determine what spectrum is usable and available for ATV, and apply for it. This "demand" system initially would allow applicants latitude in their choices and would encourage applicants to act promptly so as to obtain the most favorable spectrum. Unfortunately, the disadvantages of this approach are considerable. It is likely that disputes, petitions to deny, and mutually exclusive requests for the best supplemental allotments would result in hearings and be difficult and slow to resolve. large influx of filings also would overwhelm Commission resources and lead to further delay. Because early requests would be examined and approved without consideration of the potential preclusive effect on future allotments, a "demand" process could result in a suboptimum distribution of spectrum. Finally, this approach would not lend itself to timely identification of proposed channel allotments for international negotiations.

141. A second approach would utilize the results of spectrum studies such as those discussed above to make all the allotments simultaneously. Since we are attempting to evaluate spectrum options by matching particular spectrum blocks of 3 or 6 MHz with existing NTSC allotments, it would appear relatively straightforward to allot spectrum on a one-time nationwide basis similar to the procedure followed in Docket No. 80-90.[166] A new Table of Allotments could be promulgated in a single Rule Making in which every existing allotment would be amended to include additional specific spectrum. This process could be completed relatively quickly and would permit broadcasters to know in advance the conditions under which they would be required to operate. However, there are drawbacks to this method. It may not reflect the preferred choices of individual broadcasters as well as the first approach discussed above, and might result in some mismatches if broadcasters modify their facilities during the allotment proceeding. Also, if all stations cannot be accommodated with additional spectrum, this approach would not provide a method to determine which stations would receive the limited amount available and which would not receive any.

142. A third approach would combine the features of the first and second approaches in a two-step process. The Commission first would optimize allotments on a national basis, trying to provide as many stations as possible with supplemental spectrum. If a particular station could only be associated with one particular supplemental allotment the Commission would amend the Table of Allotments to show that particular relationship. If any of a group of supplemental channels could be associated with any of a number of stations (such as would be expected to occur with colocated stations, for example), after the allotment Rule Making we would employ some type of selection process to make specific allotments.

143. Possible procedures for the second part of this two-step process include: (1) private agreements, (2) lotteries, or (3) hearings. All of these procedures would recognize that choices made solely by the Commission may not be the best because they do not take account of terrain, man-made structures, site availability, population patterns, and similar matters that vary with locality. Also, some broadcasters might prefer allotments different from those we might make, or may not be interested in offering ATV service. The two step process would help resolve any situation in which the number of stations exceeded the number of available supplemental allotments.

144. Each possible selection procedure has advantages and disadvantages. Providing for private agreements would allow parties to resolve local allotment issues without resorting to preordained criteria, would be administratively simple, and would allow affected parties the greatest amount of choice. The parties could choose from only approved spectrum supplements, each of which would meet minimum requirements for any of the stations. If a stalemate developed or agreement could not be reached within a specified time period, we would resort to some other procedure to make the final selections. We note that private agreements are used already in other services to resolve mutually exclusive applications for new facilities.[167] Lotteries could prove effective at making assignments, but they also could result in some technical mismatches between NTSC stations and the supplemental spectrum. Traditional hearings also are a possibility, but they likely would be lengthy and slow. We also would need to develop criteria to use in settling the issues that would be raised in a hearing. Conceivably, if we had such objective criteria to decide which station should receive which spectrum supplement, we could apply them at the initial allotment stage and avoid the need for hearings entirely. In any event, regardless of the method used to make the initial allotment, it may be desirable to allow licensees some degree of freedom to reorganize the allotment arrangement. This is discussed in the following section.

145. In addition, we may also wish to adopt a "use it or lose it" approach in conjunction with a particular allotment scheme. A licensee would be given a fixed amount of time to use a particular allotment or would have to surrender it. We seek comment on all of these approaches.

D. *Post - Allotment Adjustments*

146. Making allotments on a nationwide basis is a standardized process that does not address local needs and conditions. Given the constraints on available spectrum capacity, it could prove beneficial to provide for some "fine tuning" of our plan so that ATV can be implemented promptly and widely to serve the most viewers. It may turn out, for example, that some broadcasters decide that they do not want or need to initiate an ATV service. Others may find that certain initial allotments either are not feasible for economic or technical reasons or do not suit a change in circumstances, such as a transmitter move. Finally, there may be local propagation conditions which our plan does not address but which, if accounted for, could permit greater service to viewers. For these reasons, and for those unforeseeable problems that are sure to arise, we intend to consider whether procedures should be instituted to permit broadcasters to modify and adjust ATV allotments to suit local conditions.

147. In devising such procedures, we first must decide on the nature and extent of local adjustments that might be desirable. These might encompass swaps of ATV spectrum to the extent allowed by law or adjustments of ATV service areas as mutually agreed upon by co-channel and adjacent channel parties. These procedures might even go so far as to allow reallotment of existing conventional NTSC channels so as to permit a better choice of ATV channels. The concept of licensee-initiated adjustments was raised in the *NOI*. [168] In response, a variety of legal concerns were raised, especially as to whether these ideas were consistent with Section 307(b) of the Act. We now seek comment on a more limited set of proposals.

148. In this regard we ask the following questions:

(1) Should any local adjustments be allowed? Should limitations be applied? For example, should such agreements be limited to only supplemental capacity?

(2) In particular, we seek guidance for the situation in which one broadcaster voluntarily reduces its ATV service area to allow another broadcaster to enlarge its ATV service area. Should there be a point beyond which an ATV service area should not be reduced, or should we even allow one broadcaster to completely surrender its ATV allotment so that other broadcasters could have greatly enlarged service areas?

(3) With respect to administrative action necessary to approve adjustments, we seek comment on procedures that we could use. Would treating applications for facility changes to effect these agreements as major modifications subject to public notice and petitions to deny provide sufficient Commission and public participation? Is an explanation or justification of a proposal necessary for the public interest to be served, or could we simply evaluate proposed changes and modifications on the basis of their technical merits and compliance with our rules? Should we consider proposals for changes if all affected parties do not concur or should we require unanimity?

149. These concepts for licensee involvement in allotment and post-allotment activities have some precedent in established Commission practices. Within the television service today applicants propose initial allotments, propose changes in existing allotments, swap channels, and select sites, powers and antenna heights. Many issues and problems are resolved by the affected parties without Commission involvement. In this proceeding we are dealing with the necessity to phase ATV service into the existing service. Attempting to do so will create unique problems, and we urge that parties address these problems in commenting upon the various options.

E. *Transitional Spectrum Use*

1. Positions of the Parties

150. Also germane to this inquiry are issues related to use of any supplemental assignments. A number of parties commented on the ideas advanced in the *NOI* to permit non-ATV use of additional spectrum. NAB and Matsushita oppose permitting use of additional spectrum for other purposes,[169] stating that protecting reception against inter-

ference would not be possible under these circumstances. NAB and MST also argue that such use, if unrestricted, could compromise the ability of broadcasters to offer ATV because of long-term contractual commitments and the prohibitive cost of dislodging initial users, and that marketplace principles may not protect the public interest in free television service when pitted against different market demand for non-broadcast services. MST also argues that Sections 307(b) and 309 of the Act do not permit authorization of other uses, and that such authorization would result in the Commission having to compare applications involving fundamentally different uses.[170] NAB essentially concurs with MST's comments, emphasizing the uncertainties that would exist in the context of the comparative renewal process.[171] At the least, according to NAB, the proposal is premature. Similarly, MST argues that any permitted nonconforming uses at most should be temporary and transitional.[172]

151. However, some parties favor permitting nonconforming uses. RTT states that licensees should determine whether substantial spectrum is used for broadcast or other purposes and should be free to implement new services, subject to notifying the Commission, and possibly to demonstrating that interference will not exceed that which would be caused by ATV. RTT states that there will be no impairment of future broadcaster flexibility to commence using the spectrum for ATV since provision of auxiliary service would be discretionary with the broadcaster and subject to its control.[173] Also, NPR states that this idea could facilitate enhancement of audio broadcasting,[174] and NBMC similarly states that use of the additional spectrum for other purposes should be facilitated, suggesting that audio channels could be leased to minorities as a means to promote minority ownership.[175]

2. Discussion

152. The implementation of ATV nationwide will be complex and expensive. We expect that existing licensees will not all proceed at the same pace. We are concerned that some spectrum may lay idle while the demand for ATV develops. Therefore we are considering allowing supplemental spectrum to be used for non-ATV purposes for some interim period. This opportunity would be left to the discretion of each licensee. Also, we would (1) limit non-ATV uses to a defined transitional period, and (2) authorize only secondary status for ancillary uses. These limitations should protect availability of the spectrum for ATV purposes while providing useful alternatives to broadcasters. They would protect against the type of recovery problems MST refers to in their comments discussed above, and also would prevent the type of interference referred to by NAB and Matsushita.

153. Moreover, we would continue to execute the full array of our responsibilities under Section 303 of the Act.[176] Broadcasters desiring to use ATV augmentation spectrum for other purposes would be required to notify us of supplemental uses and to obtain authorization. These uses would not be permitted to interfere with either NTSC or ATV broadcast service. As in the case of broadcasters that provide ancillary services on their subcarriers and vertical blanking interval, pursuant to Section 309 of the Act we would continue to focus on the primary broadcast use when making public interest judgments to grant or renew licenses and continue to apply the traditional broadcast criteria pursuant to Section 309 and associated law.[177] Moreover, it appears to us that these concepts might further the Act's mandate that we encourage the provision of new technologies and services to the public[178] and encourage the larger and more effective use of radio in the public interest.[179] We request comment on this concept as outlined above. We also request comment on our authority to allow ATV allotments to be used for other purposes.

VI. CONCLUSION

154. With this *Further Notice* we make a number of tentative findings and conclusions and discuss a number of proposals that begin the process of narrowing the issues related to providing for the introduction of terrestrial broadcast ATV service. First, we find that this new and innovative service can be brought to the public best and most rapidily by utilizing the existing television broadcast allocations. Based on the work of the Advisory Committee and OET, it appears that capacity might be found within the existing bands for this purpose, provided certain technical conditions are satisfied. We believe that consideration of additional spectrum outside the existing allocations would not lead to as rapid implementation of ATV service because no suitable spectrum has been identified that is not already being used for other purposes; differences in propagation characteristics between the existing allocations and other spectrum bands limit their attractiveness for ATV broadcast purposes; and even if suitable candidate spectrum were identified, proceedings involving its reallocation likely would be lengthy and result in further delay of ATV broadcasting service to the public.

155. We also have tentatively concluded that service must be continued to the public's existing NTSC receivers, at least during the transition period to ATV. Although we have not reached a determination as to the precise bandwidth that should be made available for ATV, we expect to develop a number of different allotment plans and assignment options and present them for public comment as expeditiously as possible. Resolution of these issues will enable us to relax the freeze on television assignments and allotments; to consider non-broadcast uses of the broadcast spectrum; and to provide some guidance to system designers in developing ATV technology that fits within the existing spectrum constraints. We find it in the public interest not to delay or restrict the introduction of ATV in other services or on non-broadcast media, but we are sensitive to the benefits of compatibility between equipment associated with the various video delivery methods if different methods are used.

156. We seek additional information on ATV systems being designed for terrestrial broadcast ATV service, including their bandwidth requirements and their technical characteristics relative to operating within the interference characteristics suggested by the spectrum studies to be necessary for service to be provided by all or most existing broadcasters within the present allocations. We also seek comment on ATV standards and whether it would be desirable to require compatibility between ATV broadcast transmissions and other ATV distribution media. We note that our intention is to conclude our assessment of various spectrum options expeditously, and if we decide to implement one of the supplemental spectrum options, to propose plans for that purpose. Toward that end, we have

requested comment on various allotment and assignment scenarios, as well as on what adjustments we could authorize to optimize coverage areas.

VII. ADMINISTRATIVE MATTERS

A. *Paperwork Reduction Act Statement*

157. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose no new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

B. *Ex Parte Considerations*

158. For purposes of this non-restricted proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding, 47 C.F.R. § 1.1203.

159. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present, 47 CFR § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and also must state by docket number the proceeding to which it relates, 47 C.F.R. § 1.1206.

C. *Comment Information*

160. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, interested parties may file comments on or before **October 31, 1988,** and reply comments on or before **December 1, 1988**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting comments. If parties want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

D. *Ordering Clauses*

161. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4(i),(j), 301, 303(g),(r),(s), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i),(j), 301, 303(g),(r),(s), and 403, this Tentative Decision and Further Notice of Inquiry IS ADOPTED.

162. IT IS FURTHER ORDERED, that pursuant to Sections 1.415(d) and 1.430 of our Rules, 47 C.F.R. §§ 1.415, 1.430, the motions of the Land Mobile Communications Council, Mississippi Authority for Educational Television, and Association of Maximum Service Telecasters to file supplemental information ARE GRANTED.

163. IT IS FURTHER ORDERED, that the Joint Request for Setting Additional Comment Dates filed by the Association of Maximum Service Telecasters, National Association of Broadcasters, and National Cable Television Association IS DENIED.

E. *Additional Information*

164. For additional information regarding this proceeding, contact David R. Siddall, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

Parties Filing Initial Comments

1. A-Vision, Inc. (A-Vision)
2. American Family Broadcast Group, Inc. (American Family)
3. Association of Independent Televisions Stations, Inc. (INTS)
4. Association of Maximum Service Telecasters (MST)
5. Black Television Workshop of Los Angeles (BTW)
6. Blonder Tongue Laboratories (Blonder Tongue)
7. Bonneville International Corp. (BI)
8. Broadcasting Technology Association, Japan (BTA)
9. Bundy, Jr., Walt W. (Bundy)

10. Capital Cities/ABC, Inc. (Cap. Cities/ABC)

11. CBS, Inc. (CBS)

12. Center for Advanced Television Studies

13. Chronicle Broadcasting Co. (Chronicle)

14. Corporation for Public Broadcasting, National Association of Public Television Stations, and Public Broadcasting Service (Public Broadcasters)

15. Cosmopolitan Broadcasting Corporation (Cosmopolitan)

16. Cosmos Broadcasting Corp. and M&C Communications, Inc. (Cosmos)

17. Cox Enterprises, Inc. (Cox)

18. David Sarnoff Research Center, Inc. (Sarnoff)

19. Del Rey Group (Del Rey)

20. Digideck, Inc. (Digideck)

21. Dolby Laboratories (Dolby)

22. Electronic Industries Association, Consumer Electronics Group (EIA-CEG)

23. Electronic Industries Association, Satellite Communications Section (EIA- SCS)

24. Faroudja Laboratories (Faroudja)

25. Fisher Broadcasting, Inc. (Fisher)

26. General Electric Consumer Electronics Business (GE)

27. General Instrument Corporation (GI)

28. George N. Gillett, Jr. (Gillett)

29. Great American Broadcasting Co., McGraw-Hill Broadcasting Co., Inc. and The New York Times Company (Times Broadcasting)

30. Hearst Corporation (Hearst)

31. Hitachi, Ltd., Central Research Laboratory (Hitachi)

32. Hughes Communications Galaxy, Inc. (Hughes)

33. Japan Broadcasting Corporation (NHK)

34. Japan Satellite Broadcasting (Japan Satellite)

35. King Broadcasting Company and Nationwide Communications, Inc. (King)

36. Land Mobile Communications Council, Drafting Committee (LMCC)

37. Matsushita Electric Corporation of America (Matsushita)

38. Meredith Corporation (Meredith)

39. Metrovision, Inc., Newchannels Corporation and Sammons Communications, Inc. (Metrovision)

40. Motion Picture Association of America, Inc. (MPAA)

41. National Association of Broadcasters (NAB)

42. National Black Media Coalition and the NAACP (NBMC)

43. National Broadcasting Company, Inc. (NBC)

44. National Cable Television Association, Inc. (NCTA)

45. National Captioning Institute, Inc. (NCI)

46. National Public Radio (NPR)

47. National Telecommunications and Information Administration (NTIA)

48. Neuman, W. Russell (Neuman)

49. New York Institute of Technology (NYIT)

50. Nippon Television Network Corporation, Engineering & Technical Operations (Nippon)

51. North American Philips Corporation (NA Philips)

52. Outlet Broadcasting, Inc. and Atlin Communications, Inc. (Outlet)

53. Post-Newsweek Stations, Inc. (Post-Newsweek)

54. Pulitzer Broadcasting Company (Pulitzer)

55. Radio New Jersey (Radio New Jersey)

56. Radio Telecom and Technology (RTT)

57. Radio-Television News Directors Association (RTNDA)

58. Rogers Cablesystems of America, Inc. (Rogers)

59. Satellite Broadcasting and Communications Association of America (SBCA)

60. Schreiber, William F. (Schreiber)

61. Scientific Atlanta (Scientific Atlanta)

62. Scripps Howard Broadcasting Company (Scripps Howard)

63. Time, Inc. (Time)

64. Times Mirror Broadcasting (Times Mirror)

65. Toshiba America, Inc. (Toshiba)

66. Tribune Broadcasting Company (Tribune)

67. United States Advanced Television Systems Committee (ATSC)

68. Viacom International, Inc. (Viacom)

69. Walt W. Bundy, Jr. (Bundy)

70. Zenith Electronics Corporation (Zenith)

Parties Filing Reply Comments

1. Association of Maximum Service Telecasters (MST)

2 Association of Maximum Service Telecasters, National Association of Broadcasters and the National Cable Television Association (petitioners)

3. Association of American Railroads (AAR)

4. Broadcasting Technology Association, Japan (BTA)

5. CBS, Inc. (CBS)

6. Corporation for Public Broadcasting (Public Broadcasters)

7. Cox Enterprises (Cox)

8. David Sarnoff Research Center, Inc. (Sarnoff)

9. Del Rey Group (Del Rey)

10. Hitachi, Ltd., Central Research Laboratory (Hitachi)

11. Japan Broadcasting Corporation (NHK)

12. Land Mobile Communications Council, Drafting Committee (LMCC)

13. National Association of Broadcasters (NAB)

14. National Assn. of Public Television Stations and Public Broadcasting Service (NAPTS)

15. National Broadcasting Company, Inc. (NBC)

16. National Cable Television Association, Inc. (NCTA)

17. North American Philips Corporation (NA Philips)

18. Radio Telecom and Technology, Inc. (RTT)

19. Satellite Broadcasting and Communication Association (SBCA)

20. Sony Corporation (Sony)

21. Station Representatives Association, Inc. (SRA)

22. Televisa, S.A. (Televisa)

23. Wireless Cable Association, Inc. (Wireless Cable)

24. Thompson Consumer Electronics, Inc. (Thompson)

25. Time, Inc. (Time)

26. VisionAire, Inc. (VisionAire)

Motions to File Supplemental Information

1.LMCC

2. Mississippi Authority for Educational Television (MAET)

3. MST

APPENDIX B

Material Placed in Record

The following material has been placed in the public docket record of this proceeding, and is available in our reading room, room 239, 1919 M Street Northwest, Washington, D.C. The Commission contractor, International Subscription Service, also can supply copies from the record.

Advisory Committee:

1. Advisory Committee Interim Report

2. Comments of Advisory Committee Members on draft Interim Report

3. Summaries of the Chairmen of the Working Parties and Advisory Groups of the Planning Subcommittee

4. Reports of the six working parties and two advisory groups of the Planning Subcommittee

5 Remarks of E. William Henry to the Steering Committee of the FCC Advisory Committee on Advanced Television Service

Federal Communications Commission:

1. Interim Report: Estimate of Availability of Spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands, OET Technical Memorandum FCC/OET TM 88-1

2. Analysis of UHF TV Receiver Interference Immunities Considering Advanced Television, OET Technical Memorandum FCC/OET TM 88-2.

Additional Information:

1. EUREKA: The Road to High Definition TV (pamphlet, March, 1987).

2. EIA: Miscellaneous Information on EIA IS-15 Multiport Standard, EIA R-4 Interface Working Group

3. Letter to Chairman Patrick from William Schreiber dated August 2, 1988

4. Letter to Chairman Patrick from EIA dated June 30, 1988

APPENDIX C

Definitions of Technical Terms

Artifacts: details displayed on the screen that do not accurately represent the actual scene.

Aspect Ratio: the ratio of picture width to height.

Band - limiting: restricting a signal to a maximum bandwidth.

Baseband: the frequencies that contain all the modulating signals applied to a transmitter.

Chrominance: the transmitted color information of a picture.

Color Difference Signal: color information transmitted in the form of two signals.

Compatibility: in the context of this proceeding, usually refers to the ability of an NTSC receiver to receive and display an ATV signal with quality not significantly degraded from that displayed by reception of a conventional NTSC signal *(see* ¶ 80 of the *NOI)*.

Contiguous Channel: the channel immediatley adjacent in frequency to another channel.

Cross Color: artificially created color "details" of a picture caused by an unwanted interaction between signals containing the color information that results in inaccurate colors being created and displayed on the screen.

Cross Luminance: artifically created brightness information caused by an unwanted interaction between the color information and the brighteness information. False brightness is thus created and displayed on the screen.

Detail Processors: devices that improve the displayed image.

Digital Audio: audio information which has been digitized for transmission; digitization is the conversion of an analog signal into a series of ones or zeros.

Encoders and Decoders: encoders convert a signal into another signal; decoders restore the original signal. These processes reduce the bandwidth required to transmit television signals.

Flesh Tone Correctors: devices that restore the original colors of an image; The human eye is most sensitive to the color accuracy of skin tones.

Frame Rate: the rate at which entire pictures are transmitted.

Frame Store: electronic memory in a television receiver used to store an entire picture (called a frame).

Frequency Division Multiplexing: the transmission of a single signal, with different information sent at different frequencies.

Image: a scene portrayed on the television screen.

Luminance: the brightness information of a television picture.

Multiple Analog Component (MAC) systems: systems that transmit a television signal by separating it into several components that are time diversity multiplexed together; to be distinguished from composite systems, such as NTSC, which combine the various signal components into a single signal by frequency division multiplexing.

Progressive Scanning: a system of displaying a picture in which the entire picture is shown in one continous sequence; to be distinguished from interlaced scanning, in which the entire picture is displayed in two consecutive sequences or fields. Viewers must mentally integrate the two fields to perceive the picture.

Pan and Scan: panning is the act of moving a camera slowly from one side of a scene toward the other; scanning captures the scene electronically, after panning towards the subject.

Quadrature Modulation: method of adding additional information to a signal by creating a new frequency component and delaying its transmission by a quarter of the time it takes to transmit one radio frequency cycle; quadrature modulation is used to add color information to the black and white NTSC signal.

Resolution: picture's fineness of detail; high resolution information is needed to provide a very finely detailed picture.

Retrace Intervals: time period during which the horizontal scanning line returns to the far left side of the screen or to the top of the next field (horizontal and vertical retrace intervals).

Side Panels: detail additional to that transmitted in NTSC systems that is required for a picture with a wider aspect ratio.

Signal Processing: electronic enhancement of a transmitted signal performed by the receiver.

Sound Carrier: the reference frequency upon which the audio signal is impressed (modulated).

Spatial Resolution (also called static resolution): fineness of detail of a picture that is without motion.

Sub - pixel: (utilized by the Del Ray Group HD-NTSC system) a sub-division of each picture element (pixel) into thirds; one sub-pixel is sent in each of three successive frames.

Subsampling: a method of reducing the bandwidth required to transmit a signal.

Sampling: describing a signal with another signal.

Temporal Resolution: an indication of the accuracy of motion portrayal.

Three Dimensional Filtering: a picture is a time sequence of horizontal and vertical detail (a flat view of a scene changing in time); if three dimensional filtering is employed, the scene is simplified horizontally, vertically and temporally.

Time Division Multiplexing: transmission of several signals consecutively, according to a perdetermined sequence.

Transcoders: a device used to convert a signal with one scanning rate to another.

UHF Taboos: a set of NTSC transmission prohibitions based upon certain UHF television channel combinations and transmitter mileage separations that the FCC determined are required to prevent interference to television receivers; most of the taboos are caused by receiver characteristics.

Video Carrier: reference frequency upon which video information is impressed (modulated). the resolution information is impressed upon the picture carrier and the color information is impressed upon the color subcarriers.

FOOTNOTES

[1] Within the category "ATV" we include any system that results in improved television audio and video quality, whether the methods employed improve the existing NTSC transmission system or constitute an entirely new system, *see NOI* at ¶ 19. Although terminology varies slightly within the industry, the new systems commonly are referred to either as High Definition Television (HDTV) or Enhanced Definition Television (EDTV). HDTV generally refers to systems that provide quality approaching that of 35 mm film, whereas EDTV refers to systems that perform better than NTSC but not on a par with 35 mm film.

[2] *Advanced Television Systems*, Notice of Inquiry, MM Docket 87-268, 2 FCC Rcd 5125 (1987) (*NOI*).

[3] For the purpose of this *Further Notice* the terms "broadcasting" and "broadcast service" refer to terrestrial television service provided within the existing VHF and UHF broadcast television allocations.

[4] NTSC is the acronym for the National Television System Committee, an industry committee convened first in 1940 to establish technical standards for the broadcast television system and again in 1950 to establish color television standards.

[5] The term "compatibility" is defined in the *NOI* at ¶ 80 to indicate that an ATV signal can be received on conventional NTSC reception equipment without additional hardware with quality not significantly degraded from that displayed when a conventional NTSC signal is received. In this *Further Notice* we continue to use "compatibility" in this sense. We note that Working Party 1 of the Advisory Committee's Planning Subcommittee defined the attributes of compatibility, *see* Advisory Committee, Planning Subcommittee Working Party 1 *Attributes / Systems Matrix*, Document PS/WP1-30.

[6] *See* ¶¶ 10-14, *infra*.

[7] MST, NAB, and NCTA filed a "Request for Setting Additional Comment Dates with Reply Comments" on January 19, 1988, requesting that we establish additional specific dates for comments as information on ATV becomes available. As this *Further Notice* indicates, we will provide for additional comment within the framework of existing procedures as we move towards decisions on the issues presented. Given the uncertain timetable of developments, we believe that moving forward with this Docket in response to events and decisions, rather than setting a rigid timetable, is the preferable method of proceeding. Therefore we will deny this request.

[8] A brief description of existing systems is at ¶¶ 22-37, *infra*.

[9] *See* ¶¶ 54-72, *infra*.

[10] Appendix A to this *Further Notice* lists all parties participating in this proceeding and indicates the abbreviations used to refer to these parties.

[11] *See* ¶ 3, *supra*.

[12] *Advanced Television Systems and Their Impact on the Existing Television Service*, Order, RM-5811 (Mimeo No. 4074 released July 17, 1987).

[13] *Further Sharing of the UHF Land Mobile Radio Service*, Order, 2 FCC Rcd 6441 (1987).

[14] *Formation of Advisory Committee on Advanced Television Service and Announcement of First Meeting*, 52 Fed. Reg. 38523 (1987).

[15] The Advanced Television Service Committee (ATSC) was formed in 1983 by the television industry to coordinate and develop voluntary national technical standards for ATV systems. The ATSC Charter specifies that it also will develop recommended positions for U.S. use in international standards organizations and consider submission of proposed voluntary standards, where appropriate, to this agency and to the American National Standards Institute (ANSI). *See Remarks of E. William Henry to the Steering Committee of the FCC Advisory Committee on Advanced Television Service* (March 10, 1988), a copy of which has been placed in the docket files of this proceeding.

[16] The Advanced Television Test Center (ATTC) was established in 1988 by NAB, Cap.Cities/ABC, NBC, CBS, PBS, MST and INTS to test ATV systems.

[17] Appendix B lists all reports, articles, and other statements that the Commission has placed in the record of this proceeding. Parties are invited to comment on the information contained in these additional documents.

[18] Interim Report at 6, fn. 3.

[19] *Id.* at 5-7.

[20] *Id.* at 7.

[21] *Id.* at 8.

[22] *See* Eureka 95, *The Road to High Definition Television* (pamphlet, 1987). A copy is in the docket file.

[23] PAL is the acronym for Phase Alteration Lines, a system in which the phase of the color burst subcarrier inverts in adjacent scanning lines. It is used in approximately 58 countries worldwide, with slight variations between countries.

[24] SECAM is the acronym for Sequential Color with Memory. SECAM defines the parameters of the horizontal and vertical scanning rate and the frequency distribution of the visual, aural and color information within a TV channel. It is used in France, the USSR and approximately 21 other countries, with slight variations between countries.

[25] Matsushita Comments at 10. MUSE is the acronym for "Multiple Sub-Nyquist Encoding", the process by which the 22 MHz baseband NHK studio signal is compressed into 8.1 MHz for transmission in a 9 MHz channel. *See* NHK Comments at 2.

[26] Toshiba Comments at 1.

[27] Japan Satellite Comments at 2.

[28] *See* Nippon Comments for a detailed discussion of the ten techniques being considered by the BTA.

[29] Toshiba Comments at 1.

[30] BTA is a standards setting organization for broadcasting in Japan. BTA Comments at 3.

[31] BTA Reply Comments at 6-7.

[32] NHK Comments at 12.

[33] The spectrum studies conducted by the Advisory Committee's Planning Subcommittee Working Party 3 indicate that provision of additional spectrum to stations for ATV is facilitated if contiguous spectrum is not required. Interim Report at 18.

[34] NHK Comments at 16. Sony goes further, stating that even the best of contemporary bandwidth reduction techniques cannot allow a representative HDTV picture portrayal via a single 6 MHz channel, and consider 8 to 9 MHz to be necessary to provide HDTV. Sony Reply Comments at ii.

[35] Sarnoff Comments at 6.

[36] CCIR is the acronym for the International Radio Consultative Committee, an organ of the ITU that studies technical and operational questions relating specifically to radiocommunications. Discussion on HDTV has been centered in the CCIR Television Study group.

[37] This discussion is based on comments received in this proceeding, the reports of the Advisory Committee, and trade press articles.

[38] Hitachi Comments at 2-4.

[39] Matsushita Comments at Appendix 1.

[40] Matsushita Comments at ii.

[41] Nippon Comments at 4.

[42] *Broadcasting*, April 18, 1988, at 49, and *Communications Daily*, June 7, 1988, at 4.

[43] Faroudja techniques are described in 96 SMPTE Journal 750-761 (No. 8, Aug. 1987).

[44] Although it has not commented in this proceeding nor developed a complete system, we understand that High Resolution Sciences (HRS) has developed methods for improving the quality and resolution of NTSC.

[45] This technical description is based upon that attached to Del Rey's Comments.

[46] Dr. William Schreiber, a professor at the Massachusetts Institute of Technology, is Director of MIT's Advanced Television Research Program.

[47] Schreiber Comments at 4.2-7.

[48] For technical description *see* Sarnoff Comments at Appendix A.

[49] NHK Comments at 9-15.

[50] A technical description is included in the NYIT Comments at Appendix.

[51] For a technical description *see* A.G. Toth, M. Tsinberg, C.W. Rhodes, *NTSC Compatible HDTV System*, IEEE Transactions on Consumer Electronics (Feb. 1988).

[52] This change in spectrum requirement is noted by NA Philips in a letter to Advisory Committee chairman Richard Wiley, May 26, 1988, at 10. The letter was submitted by NA Philips as a comment on the draft Interim Report, and is included with the Advisory Committee materials in the docket file of this proceeding.

[53] "Pan and scan" refers to selecting the relevant portion of the wide aspect ratio image for display on NTSC receivers.

[54] The possible extent of the constraints are the subject of the Advisory Committee Interim Report and the OET studies, discussed below at ¶¶ 54-72.

[55] Shreiber Comments at 4.2-7.

[56] NHK Comments at 15.

[57] NA Philips at 33.

[58] For technical description, *see* ATSC, *HDB - MAC A New Proposal For High Definition TV Transmission* (Committee Document T3/147, Dec. 15, 1987).

[59] *See* discussion of the studio standard at ¶ 21, *supra*.

[60] This system is described in Ninomiya, Ohtsuka, and Izumi, *A Single Channel HDTV Broadcast System - The MUSE* (NHK Laboratories Note 304, September 1984).

[61] Advisory Committee, Systems Subcommittee Working Party 1, Document No. SS/WP1-014.

[62] MST Comments at Appendix A.

[63] Proposed ATV systems are discussed at ¶¶ 22-37, *supra*.

[64] Cap. Cities/ABC Comments at 4.

[65] MST Comments at 34. MST and LMCC filed supplemental information that includes studies performed by the Media Laboratory at the Massachusetts Institute of Technology and the Committee for the North American HDTV Demonstrations to the Public that address the degree of technical quality that consumers desire. We will accept these late-filed comments, as well as those of MAET.

[66] NBC Comments at 11.

[67] NHK Comments at 21.

[68] Matsushita Comments at 6.

[69] Toshiba at 1.

[70] Time Comments at attachment p. 5, *High Definition Television: An Opportunity for Cable*, by Home Box Office, Inc.

[71] Zenith Comments at 5-6.

[72] LMCC Comments at 4.

[73] Time Comments at 14.

[74] LMCC Comments at 4.

[75] Rogers Comments at 4.

[76] CBS Comments at 53.

[77] RTT Comments at 3.

[78] Neuman at 2.

[79] NBMC Comments at 2.

[80] CBS Comments at 54.

[81] MST Comments at 37.

[82] Sarnoff Comments at 14.

[83] MST Comments at 42.

[84] Blonder Tongue Comments at 3.

[85] NHK Comments at 21.

[86] Schreiber Comments at 2-3.

[87] Matsushita Comments at 11.

[88] MST Comments at Appendix B, p. 7.

[89] NYIT Comments at 13.

[90] NA Philips Comments at 29.

[91] CBS Comments at 31.

[92] Advisory Committee, Report of the Spectrum Utilization and Alternatives Working Party (Working Party 3) of the Planning Subcommittee at 1 (April 17, 1988).

[93] *Id.* at 18.

[94] *See* Jansky and O'Connor *Impact of the UHF - Taboos on Availability of Spectrum for Advanced Television Systems*, attached to Report of Working Party 3 of the Advisory Committee's Planning Subcommittee.

[95] An explanation of the UHF taboos is provided, *infra*, in the context of the OET receiver study.

[96] *See Interim Report: Estimate of Availability of Spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands* FCC/OET TM 88-1, and *Analyses of UHF TV Receiver Interference Immunities Considering Advanced Television*, FCC/OET TM 88-2.

[97] The required distance between TV assignments generally correlates with the ratio of desired-to-undesired signal strengths (D/U ratio) if the transmission power and antenna height and gain are kept constant. The greater the separation, the greater the D/U ratio. The minimum required D/U ratio depends upon a number of factors, including the desired picture quality, the interference rejection characteristics of the receiver, and the antenna characteristics.

[98] *See* 47 C.F.R. § 73.610 (1987) for the current mileage restrictions between cochannel stations. The cochannel mileage restrictions vary by zone and are different for VHF and UHF channels, ranging from 248.6 kilometers (154.5 miles) to 353.2 kilometers (219.5 miles).

[99] Use of precision offset carriers permits stations to operate at a 28 dB D/U ratio, whereas otherwise 45 dB D/U is necessary to obtain comparable reception quality.

[100] There are 1760 stations in this data base, of which 706 are VHF and 1054 are UHF. Protection also is provided for existing land mobile operations on channels 14 through 20 in eleven major urban areas. Existing Canadian and Mexican stations are treated as requiring the same protection as U.S. stations but not requiring additional spectrum for ATV purposes. Low power television (LPTV) and translator stations are not included base due to their secondary status, therefore it is possible that some authorized LPTV stations may conflict with certain potential ATV assignments developed in our studies.

[101] *See* ¶¶ 103-105, addressed to the treaties that govern our TV assignments in border areas.

[102] *See* ¶ 64, *supra*, for the definition of "existing stations".

[103] The minimum co-channel and adjacent channel separation distances for VHF and UHF stations are codified at 47 C.F.R. § 73.610 (1987) as follows:

Co-channel:

VHF Channels	**UHF Channels**
Zone I - 170 miles	Zone I - 155 miles
Zone II - 190 miles	Zone II - 175 miles
Zone III - 220 miles	Zone III - 205 miles

Adjacent Channel (n + or -1):

VHF Channels	**UHF Channels**
60 miles	55 miles

[104] These minimum separation distances are established by the UHF taboos, *see* 47 C.F.R § 73.698, Table IV (1987):

1) Intermodulation, cross-modulation and half-IF (n + or - 2, 3, 4, and 5 channels): 20 miles;

2) Local oscillator (n + or - 7 channels): 60 miles;

3) IF beat (n + or - 8 channels): 20 miles;

4) Sound image (n + or - 14 channels): 60 miles; and,

5) Picture image (n + or - 15 channels): 75 miles.

[105] *See Supra* note 104 and accompanying text.

[106] This conclusion is limited to VHF and UHF terrestrial broadcast television. We reiterate that nothing in this *Further Notice* is intended to suggest that we might restrict licensees in other services, such as DBS, from transmitting ATV signals with bandwidth of more than 6 MHz.

[107] The primary signal might carry information, perhaps on the vertical blanking interval, to indicate to an ATV receiver the frequency of the augmentation signal.

[108] Schreiber and NHK have designed systems that use 6 MHz bandwidths but are not compatible with NTSC receivers.

[109] Advisory Committee, Planning Subcommittee Working Party 5, Report at 101 (May, 1988).

[110] *See* ¶ 7, *supra*.

[111] While it is possible that some 6 MHz ATV systems will require a higher signal to noise ratio than NTSC, they would not require a change in the signal delivery bandwidth.

[112] *See* Advisory Committee, Planning Subcommittee Working Party 4 Report, section 4.3 at 9 (May, 1988).

[113] *Id.* section 4.3 at 2.

[114] The bandwidth of Ku band FSS transponders typically is 54 MHz, but may be as wide as 72 MHz. A number of system operators transmit two channels of video (6 MHz baseband) through a single 44 or 54 MHz channel. *See Id.*, section 4.3 at 9.

[115] The international Plan (RARC-83) provides the U.S. with 32 interleaved channels (16 on each polarization) at each of eight orbital positions. ATV could be accommodated by expanding channel bandwidth or by combining channels. *See e.g.* DBS applications of United States Satellite Broadcasting Co., Inc. (DBS-88-06-MP) and Hughes Communications Galaxy, Inc., (DBS-88-07-MP). Of course, combining of 24 MHz channels to transmit these wider formats would reduce the overall number of channels available.

[116] Advisory Committee, Planning Subcommittee Working Party 3, Report at 44-45.

[117] Advisory Committee, Planning Subcommittee Working Party 3, Report at 46.

[118] Advisory Committee, Planning Subcommittee Working Party 4, Report at section 4.2 at 5. The basis for this estimate is the cost of adding NTSC channels. Making this change would effectively lower the maximum power per channel, which would result in either a shorter path or increased probability of signal degradation during periods of heavy precipitation.

[119] Working Arrangement for Allotment and Assignment of VHF and UHF Television Broadcasting Channels Under the Canadian-U.S.A. Television Agreement of 1952 (1968), *see* 3 UST 4443, as amended.

[120] United States-Mexico VHF Television Agreement (1962) and Agreement between Mexico and the United States Concerning UHF Television Channel Assignments (1958), 13 UST 997, as amended.

[121] Canada has been an active participant in the deliberations of T3, a sub-committee of the ATSC considering HDTV. Televisa, a Mexican corporation engaged in television networking and broadcasting in the Republic of Mexico, submitted a Statement of Interest in response to the *NOI* indicating that it considers the conclusions reached and the standards adopted in this proceeding will affect broadcasting in Mexico and that it intends to participate in the Advisory Committee subcommittees and working parties.

[122] We codified the NTSC color standard in *Amendment of the Commission's Rules Governing Color Television Transmissions*, 41 F.C.C. 658 (1953), *see* 47 C.F.R. §73.682 (1987).

[123] MST Comments at 54.

[124] NAB Comments at 19 - 20.

[125] GE Comments at 14.

[126] NYIT Comments at 22.

[127] RTT Comments at 8. We do not address the merits of the T-NET proposal because it is outside the scope of this proceeding concerning ATV.

[128] We have received a number of informal inquiries regarding possible changes to the NTSC standard that would, it is argued, eliminate obsolete provisions or modify the standard to improve signal quality. We encourage attempts to improve the existing NTSC system, and, upon receipt of formal proposals, we will act promptly to process requests for waivers and experimental authorizations, or take whatever other measures may be appropriate. In evaluating these requests, we intend to apply the same criteria discussed in this paragraph.

[129] NAB Comments at 7.

[130] GE Comments at 10.

[131] MST Comments at 56.

[132] SBCA Comments at 4.

[133] NTIA Comments at 6. In a recent speech Alfred Sikes, Deputy Assistant Commerce Secrtary and head of NTIA, stated that based on studies done by MIT and NTIA, he no longer believes we must act so quickly to avoid being overtaken by imported technology. While he continued to recommend that the FCC set a standard, he urged that it not be set in a preclusive way. *Broadcast Magazine*, June 6, 1988 at 30.

[134] Neuman Comments at 5.

[135] SBCA Comments at 4.

[136] Advisory Committee, Planning Subcommittee Working Party 5, Report at 97.

[137] *Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters for Stereo Sound*, Second Report and Order in Docket No. 21323, 49 Fed. Reg. 18100 (1984).

[138] To the extent that we protect certain features of a particular ATV transmission technique, our purpose would be to encourage compatibility among ATV systems and to prevent interference to such systems, but not necessarily to specify minimum quality of the transmitted or received signal or to mandate a single acceptable ATV system. Our choice concerning what features to protect and the way we define such protection may have implications for signal quality. *Cf. id.*

[139] Letter to Chairman Dennis R. Patrick re Open Architecture Receivers, from William F. Schreiber, Director of the Advanced Television Research Program, Massachusetts Institute of Technology, dated August 2, 1988.

[140] Letter to Chairman Dennis R. Patrick re Open Architecture - Advanced Television, from Gary J. Shapiro and Eb Tingley, Consumer Electronics Group of the Electronic Industries Association, dated June 30, 1988.

[141] MST Comments at 23; GE Comments at 3; NYIT Comments at 2.

[142] NAB Comments at 13; NTIA Comments at 8.

[143] SBCA Comments at 4.

[144] NA Philips Comments at 21.

[145] MST Comments at 27.

[146] *See* Advisory Committee, Planning Subcommittee, Reports of Working Party 1, Working Party 4, Working Party 5, and Advisory Group 2.

[147] Advisory Committee, Planning Subcommittee Working Party 5, Report at 83.

[148] Time Comments at 36. Time uses the phase "baseband video signal" to refer to the component video signal.

[149] GI Comments at 13.

[150] NTSC employs composite video signals, which combine the brightness and color information in a single signal. Component video signals provide separate signals for the brightness and color information. This can be accomplished in several ways, including 1) three signals, one each for the red, green and blue color information (RGB) or 2) two signals, one for the brightness level and one for the color information (Y/C).

[151] Interim Report, Executive Summary at 1.

[152] Advisory Committee, Planning Subcommittee Working Party 4, *Chairman's Report* at 3; Advisory Committee, Planning Subcommittee Working Party 5, Report at 84-87 (May 1988).

[153] Advisory Committee, Planning Subcommittee Working Party 5, Report at page ES-12 (May 1988). A Red/Green/Blue (RGB) type of BCV input is cited.

[154] Advisory Committee, Planning Subcommittee Advisory Group 2, Document No. PS/AG2-0006 at 4 (March 1988).

[155] A Status Report and the detailed specification of EIA IS-15 (Multiport Standard) has been placed in the Docket file. The standard input apparently has been implemented by only a few manufacturers. EIA considers the broader acceptance of the multiport to depend upon acceptance of the "plug-in decoder" concept by cable operators and availability from manufacturers of cable scrambling equipment, *see* EIA letter, *supra* note 140.

[156] Schreiber Comments at 4.3.5. *See also* Interim Report at 9. For a nontechnical description of the OAR concept, *see* ATRP-T-88R, a note by William F. Schreiber, submitted to the Advisory Committee, Systems Subcommittee Systems Analysis Group, dated June 12, 1988.

[157] EIA Letter to Chairman Patrick, *supra* note 140.

[158] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[159] *Id.* at 333 n.9.

[160] Indeed, in *United States v. Storer Broadcasting Co.*, 315 U.S. 192 (1956), the Supreme Court stated that the Commission may, by general rule, establish eligibility standards that obviate the need for individual hearings under Section 309(a) of the Act prior to denial of an application.

[161] *Shared Use of Broadcast Auxiliary Facilities With Other Broadcast and* Nonbroadcast Entities, Report and Order in Docket 81-794, 93 F.C.C.2d 569 (1983); *Transmission of Teletext by TV Stations*, First Report and Order in Docket 81-741, 48 Fed. Reg. 27054 (1983); *Use of Subsidiary Communications Authorizations*, First Report and Order in Docket No. 82-536, 48 Fed. Reg. 28145 (1983).

[162] *MCI Airsignal International, Inc.*, FCC 84-397 (1984).

[163] *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order in Docket No. 79-318, 86 F.C.C.2d 469 (1981).

[164] An "allotment" is the association of a specific frequency or channel with a particular geographic area. For example, channel 26 is allotted to Chicago. Allotments are made in Rule Making proceedings and incorporated in our rules and regulations, *see* 47 C.F.R. § 73.606 (1987). By contrast, an "assignment" is authorization for a specific party to use a frequency or channel. Thus, in Chicago Weigel Broadcasting Co. has been assigned channel 26 for the primary purpose of broadcasting a television signal. Under our proposal, supplemental spectrum would be associated with Channel 26 in Chicago and the licensee of that channel would be authorized to utilize it. *See Television Assignments*, Sixth Report and Order, 41 F.C.C. 148 (1952).

[165] Supplemental allotments in the border areas must be negotiated with Canada and Mexico. In the interest of an equitable sharing of spectrum it may prove necessary to complete these negotiations before ATV service is implemented in these regions. *See* ¶¶ 103-105, *supra*.

[166] *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, Report and Order in Docket No. 80-90, 94 F.C.C.2d 152 (1983).

[167] *See, e.g., American Radio-Telephone Service, Inc.*, 54 RR 2d 287 (1983).

[168] Parties generally opposed the concept of permitting private agreements on interference as set out in the *NOI* at ¶¶ 112-113. *See* NAB Comments at 20, MST Comments at 62, Matsushita Comments at 19, and NBMC Comments at 3.

[169] NAB Comments at 20 and Matsushita Comments at 18.

[170] MST Comments at 61-65.

[171] NAB Comments at 20-22.

[172] MST Comments at 57.

[173] RTT Comments at 10.

[174] NPR Comments at 7.

[175] NBMC Comments at 4.

[176] *See* 47 U.S.C. §303(a), (b), (c) (1982).

[177] The concept of authorizing ancillary uses of spectrum has been applied in other broadcast service concepts. For example, television licensees may utilize the vertical blanking interval to distribute textual communications unrelated to their main programming, *see Transmission of Teletext by TV Stations, supra* note 161; FM broadcasters may utilize their subcarrier frequencies to provide broadcast or nonbroadcast services such as private paging and dispatch services, data transmission, and facsimile transmission, *see Use of Subsidiary Communications Authorizations, id.*; television broadcast auxiliary facilities may be used for both broadcast and nonbroadcast purposes, *see Shared Use of Broadcast Auxiliary Facilities With Other Broadcast and Nonbroadcast Entities, id;* and ITFS licensees may use their assignments for non-instructional purposes, *Establishment of Multi-Channel Systems*, Report and Order in Docket No. 80-112, 94 F.C.C.2d 1203 (1983). Similarly, in the new Direct Broadcast Satellite (DBS) service we have accorded prospective DBS licensees considerable technical and operational flexibility because, like ATV technology, DBS technology is relatively new and novel, the costs for licensees to develop and establish such service are significant, and we wish to provide an incentive for the service to develop, *see Petition for Declaratory Ruling Regarding Permissible Uses of the Direct Broadcast Satellite Service*, Memorandum Opinion and Order, 1 FCC Rcd 977 (1986) (DBS Declaratory Ruling).

[178] 47 U.S.C. §157 (Supp. 1987).

[179] 47 U.S.C. §303(g) (1982).

STATEMENT OF CHAIRMAN DENNIS PATRICK ON ADVANCED TELEVISION

Our action today ensures that broadcasters will be able to deliver movie quality pictures and digital sound to the American public in the not too distant future. The decisions we have made today are a major step in giving researchers and equipment manufacturers the ability to make key decisions on designing systems. I am pleased to note that, by this decision, the Commission ensures the American public that *no* existing TV sets will be made obsolete. Finally, this decision will put the U.S. in the forefront of the international quest for new TV technology.

When we initiated this Inquiry in July 1987, we began a study of advanced television with an open mind and a clean slate. While we did not intend to rush to judgment, we nevertheless announced our intention to move as expeditiously as possible to secure answers to the many questions before us. To assist in identifying, organizing and quantifying the many public policy and technical tradeoffs before us, we empaneled an Advisory Committee and required it to submit an interim report to assist us in making some preliminary decisions.

The Advisory Committee did an outstanding job in organizing itself quickly and developing a significant amount of information, especially regarding the availability of spectrum capacity in the existing television broad-

cast allocations. I commend Committee Chairman Richard E. Wiley, Planning Subcommittee Chairman Joseph Flaherty, and the 175 participants who worked very hard to produce the first report and who continue to work diligently on this project. With the submission of the Interim Report, the public record developed in response to the Notice of Inquiry, and the research performed by the Commission's staff, we are in a position to make tentative decisions and begin making some of the difficult tradeoffs which confront us in this process.

In this Further Notice we have chosen to make our first decisions on matters relating to spectrum. This is an appropriate place to start for several reasons. First, recognizing the constraints on the amount of capacity within which advanced terrestrial broadcast TV systems may operate will provide guidance to those who are developing such systems so that time and resources are not spent on designs which cannot ultimately be implemented. Second, to the extent that we can resolve supplies related to the amount of additional spectrum capacity existing broadcasters should be provided, we will then be able to both relax the freeze on new television assignments and consider the public utility of allocating UHF spectrum to non-broadcast uses. Finally, engaging spectrum issues now provides guidance to the Advisory Committee in both its testing and implementation activities.

These are important and significant steps forward for the American television viewer and the entire production and transmission industry. With our action today, the work, research, and money that is being invested in finding the ATV answers can be focused more sharply and used more productively. Transforming the U.S. television industry will take time. We recognize the critical nature of this undertaking. It will take a number of legal and regulatory actions. Only as each step is taken can necessary work begin on the next one.

None of this will be easy, but it can and will be done. Our action today makes clear that depending on the amount of spectrum which is necessary for ATV and other technical matters, there may or may not be enough additional spectrum available for all existing television licensees. For that reason, we discuss possible post-assignment processes which could ameliorate difficulties arising from a uniform, nationwide spectrum assignment process. I urge the broadcasting community to carefully evaluate all aspects of this inquiry and give us their comments on an ATV approach that will succeed technically, economically, and procedurally. ATV which is wonderful in theory but takes decades to implement or is too expensive for most consumers would make terrestrial ATV an unfulfilled possibility, and that is in no one's interest.

Because these issues are so complicated and could not be determined with complete accuracy by the best informed experts, I think it is critical to allow as much latitude as reasonably possible for on-the-spot adjustments by the people who will have to make it work--local broadcasters. In making thousands of spectrum assignments across the country, the Commission necessarily treats markets as a series of circles; resource limitations preclude more precise definitions. Reality, of course, more closely resembles odd shaped pieces of a jigsaw puzzle. For that reason, we address the possibility of licensees adjusting the spectrum assignments initially made by the Commission, subject to Commission approval. By factoring in broadcaster adjustments based on local market realities, the Commission can better fulfill its statutory mandate to ensure that spectrum is used to its maximum public benefit. In addition, we raise the possibility of licensees using supplemental assignments for non-ATV purposes, subject to the conditions that non-ATV use be limited in duration and not interfere with ATV operation by other licensees. Since not all licensees will be ready to implement ATV at the same time, this would allow valuable alternative uses of this spectrum until such time as there is sufficient demand for ATV in a licensee's market.

I realize that some broadcasters have expressed concerns about non-broadcast use of UHF spectrum. It is curious that broadcasters, the intended recipients of supplemental spectrum, would fear their own non-broadcast use of spectrum on an interim basis, where non-interference to broadcasting is assured. More importantly, these proposals have been carefully crafted to strike an appropriate balance with the larger public benefit in valuable spectrum not sitting idle because its designated use is not yet economically warranted in a particular community. Furthermore, it is more difficult to sustain a conclusion that (1) a great deal of spectrum should be allocated for ATV and (2) the additional spectrum should all be given to existing licensees, without appropriate safety valves that ensure the spectrum will ultimately be used even if ATV is not demanded by the public everywhere at the same time. For these reasons, I urge interested parties to focus on Section V-D and E of the Further Inquiry.

Some urge extreme caution before we decide these critical issues. I agree that we must be careful in our actions. However, broadcasters, as well as the public, will be harmed by undue delay. We will not and cannot constrain technological development. Technological advance is inexorable. It is occurring in other media. It is occurring in other countries. To try to stand still would be the surest way to harm the great terrestrial broadcasting resource that we have developed in this country. So while we proceed cautiously here to avoid mistakes, we nonetheless move forward with these timely, critical first decisions, to ensure the continued vitality of the broadcast industry and to maximize the public benefit from the valuable spectrum resource that this Commission is charged with administering.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service; Review of Technical and Operational Requirements: Part 73-E, Television Broadcast Stations; Reevaluation of the UHF Television Channel and Distance Separation Requirements of Part 73 of the Commission's Rules.

At this stage, Advanced Television is like a diamond in the rough. I hope that today's rough cut will bring some of the facets into view.

I support this decision because it sends two signals to the broadcast industry and the public. First, we strongly support the development of advanced television as an over-the-air service. Second, we recognize the many difficulties involved in introducing ATV and we set them out frankly, in the hope that the public will help us choose among the various imperfect solutions.

Spectrum management is probably the Commission's hardest job. Every time we allocate spectrum, there are legitimate conflicting demands. We can rarely accommodate all of them. This proceeding is especially challenging, because we are grafting a new service--advanced television--onto an established allocation scheme. I wish we could wave a magic wand and give the public a full-blown ATV service. In that dream world, every broadcaster would have an additional six MHz of spectrum, or even twelve, and everyone would have an ATV service area at least as large as the existing NTSC contours. But the hard truth is, that won't happen. Something has to give--at least in the major markets, where demand for spectrum is intense.

Broadcasters have urged us to consider using spectrum outside the existing VHF and UHF bands. That approach has advantages--at least in theory. By using additional spectrum, we could assign more spectrum to each station and, thereby, alleviate the potential shortage of spectrum for ATV. Yet, I support the tentative decision to use the existing television spectrum, because I consider it the best of the imperfect alternatives. As our decision demonstrates, it is difficult to identify any significant blocks of spectrum outside the VHF and UHF bands that would be available for terrestrial broadcast use. Even if spectrum above 1 gigaherz were available, using it for terrestrial broadcasting would be problematical, as some broadcasters have conceded.[1]

As for ATV transmission standards, we appropriately conclude it is premature to set standards today. However, as I have said before, I am not in any way reluctant to set standards at the proper time.

I also agree that we should look more closely at options that have troubled me in other proceedings. These options include post-allotment negotiations over ATV service areas and so-called "flexible use" of the spectrum. I do so solely because of the unique circumstances facing us in making ATV allocations. For example, if we make an across-the-board allocation to all broadcasters, we may include some licensees that, for financial or other reasons, do not wish to make the substantial capital investment required to transmit ATV signals over-the-air. I am willing to *consider* permitting broadcasters to negotiate among themselves to trade ATV channels or to relinquish part of their ATV service area. I would not, however, support negotiations that would result in viewers losing any of their existing NTSC service. Even if we were to adopt this procedure, the Commission would retain its jurisdiction and control, because *every* negotiated agreement would be subject to public comment and Commission approval.

Similarly, with "flexible use" there is a legitimate argument that the supplemental spectrum given to broadcasters should not lie fallow during the development of ATV. Therefore, I believe we need to consider the possibility of making the spectrum available for use in the interim. If we approve non-broadcast use of the supplemental spectrum, it will be strictly limited in time and secondary to broadcast service. These restrictions limit economic opportunities for licensees, but that is the cost of our making a strong commitment to ATV. We should not allocate spectrum to ATV and then have licensees use it indefinitely for a non-broadcast service such as paging.

Some urge us to move more slowly, to wait for more evidence before acting. That is tempting; we will undoubtedly have more information next year than we do now. But delay creates significant costs. For example, our freeze on television applications is keeping new competitors out of broadcasting and will continue to do so until we make our basic spectrum decisions. That hurts the public. In addition, if the Commission moves too slowly, we run the risk of being overtaken by events. High definition television is undoubtedly coming "on the boat" via VCRs, and probably via cable. We have an obligation to give broadcasters the opportunity to offer the same service, without undue delay. Our involvement at this stage has another significant advantage. By narrowing spectrum options for ATV, private industry can better target its resources to more rapidly develop the technology. Under these circumstances we have a duty to act.

Nevertheless, of necessity, our decisions are still tentative. High definition television is an exceptionally dynamic field. Potential new systems are announced almost every day and basic research is ongoing. While I think we are heading in the right direction, I will seriously consider the comments of those who think we are wrong.

FOOTNOTE FOR STATEMENT

[1] As the Association of Maximum Service Telecasters said:

> "Finally, the propagation characteristics of the frequencies above 1 GHz would make it difficult for broadcasters to provide coverage to their present service area. Indeed, use of the 12 GHz or higher frequencies would appear to require major technological breakthroughs." Comments, p. 43. *See also* Comments of NBC, p. 16; The David Sarnoff Research Center, Inc., p. 16; New York Institute of Technology, p. 18 ("The higher susceptibility to weather, physical obstruction, vegetation, and other forms of attenuation make this spectral region unsuitable for terrestrial use"). In addition, if we adopt an augmentation approach, it could prove extremely difficult for a broadcaster to combine a VHF or UHF channel with a supplemental allotment in the spectrum above 1 GHz.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART

Re: Tentative Decision and Further Notice of Inquiry in the Matter of advanced Television Systems and their Impact on the Existing Television Broadcast Service; Review of Technical and Operational Requirements: Part 73-E, Television Broadcast Stations; Reevaluation of the UHF Television Channel and Distance Separation Requirements of Part 73 of the Commission's Rules (MM Docket No. 87-268).

Today's action marks a significant step in the process of developing the Commission's policy on Advanced Television (ATV) systems. I join my colleagues in reaching some fundamental tentative decisions regarding ATV. We agree that providing for terrestrial use of ATV technology would benefit the public and that the benefits of this technology can be realized most quickly if existing broadcasters are permitted to implement ATV. Furthermore, we believe that service to viewers using NTSC receivers must be continued irrespective of how ATV services will be delivered. We are predisposed to require that ATV systems be NTSC compatible. Finally, we find that it is in the public interest not to retard the development of ATV technology in other services or on non-broadcast media.

Spectrum for ATV Systems

I must part company with the majority's decision to limit the spectrum available for ATV systems to that already allocated to broadcast television. This tentative decision is contrary to the findings of the Advisory Committee on Advanced Television Service, which has not ruled out the need for additional non-broadcast spectrum. Essentially all NTSC compatible ATV systems are confined to the realm of computer simulation and theory, it is too early to know if the assumptions necessary to accommodate ATV within currently allocated broadcast spectrum can be accepted, *e.g.,* channel and co-channel restrictions and UHF taboo restrictions. Since the Commission does not know the actual spectrum needs of operational ATV systems, I cannot support the unsubstantiated conclusion that spectrum needed for ATV systems should be obtained only from spectrum that is now allocated to broadcast television. While I hope that ATV systems can be accommodated within existing broadcast allocations, I believe that it is premature to make a tentative decision on spectrum availability for ATV systems.

The fundamental public policy issue centers on the fact that ATV systems may require more than 6 MHz of spectrum that currently is allocated to each broadcast television licensee. At this time, most of the proposals for ATV systems require more than 6 MHz. Our decision will likely foreclose the possibility of developing superior ATV systems that might require additional spectrum. Moreover, by artificially limiting the amount of spectrum available in this decision, the Commission is creating a scenario where there is simply not enough spectrum to allot each existing broadcaster in the top twenty markets additional spectrum for ATV service, assuming the maintenance of a reasonable service area. If the broadcast industry or the Commission settles on an ATV system(s) requiring more than the current 6 MHz, then the Commission will be creating two classes of broadcasters in these markets -- those who have additional spectrum for ATV service and those who do not. Therein lies the problem that broadcasters and the Federal Communications Commission must resolve. Until we have record evidence of the spectrum needs of an actual operating ATV system, discussion of the possibilities are exercises in speculation.

My colleagues and I are approaching the issue of spectrum needs for ATV from two different perspectives. the majority believes that by identifying specific spectrum allocation options we will be establishing the boundaries within which ATV technology will have to be developed. I argue that while my colleagues raise important questions, such questions are premature and work to restrict the marketplace development of ATV technology. Furthermore, the spectrum allocation proposals are based on untested technical assumptions. I would have preferred waiting until laboratory or field tests of ATV technologies were completed before we attempted to devise specific allotment schemes for existing broadcasters. By testing ATV technologies we would know the appropriate technical conditions essential to allocating additional spectrum. Unfortunately, the *Notice* adopted by the majority is riddled with hypothetical situations and untested assumptions resulting in hypothetical questions. At best, the Commission is likely to receive hypothetical answers.

To illustrate my concern, I draw your attention to a statement made by Mr. Faroudja of Faroudja Laboratories in the August 29, 1988 issue of Broadcasting Magazine (See, page 9). In testing Super NTSC advanced television transmission system on two California cable systems, it was discovered that the predicted results of some tests differed from the results gained from tests conducted under actual cablecasting conditions. Mr. Faroudja is quoted as saying "It shows how far practice is from theory." The spectrum scenarios presented in today's Notice are theories. The *Notice's* allocation and allotment theories may differ dramatically from the actual spectrum needs of operational ATV systems. I believe that the theories presented in this *Notice* are speculative and may lead the Commission to inappropriate decisions.

Allotment Proposals

Because I believe that spectrum allotment proposals are premature, likewise, all the associated "what if" questions pertaining to each allotment proposal are premature and raise unnecessary problems that may impair the development of ATV. For example, the proposal to allocate an additional 3 MHz of spectrum to augment existing channels assumes elimination of the UHF taboos. However, any transmission system that assumes elimination of the taboos will most likely cause interference to existing television sets. The allotment proposals conflict with the idea that an ATV system should be backward compatible. In addition, the proposal to allot 6 MHz of additional spectrum to broadcasters to transmit ATV programming simultaneously with their existing channels not only creates the technical problems discussed above, but also faces legal obstacles. This proposal raises significant *Ashbacker* [1] concerns, because it may be characterized as giving existing licensees an additional 6 Mhz of spectrum to broadcast distinct programming. As a result, it becomes exceedingly difficult to justify such an allocation on the grounds that it is merely augmenting existing channels. The result may be endless legal battles and even comparative hearings, instead of a smooth transition to ATV.

I simply do not see the need to further complicate the development of the Commission's ATV policy by raising purely theoretical issues at this time. Many of these controversies will be moot depending on the transmission standard(s) selected for ATV.

Flexible Use

Aside from the spectrum allocation and allotment schemes, I am also compelled to dissent to the flexible use of spectrum proposal. The issue of flexible use was raised in the initial *Notice* and the commenters overwhelmingly opposed the concept. Now, by placing conditions on flexible use -- permitted only during some transitional period and on a non-interfering basis -- we once again seek comment on this issue. A more fundamental question to ask is how pertinent is flexible use to the development of ATV? Additionally, what constitutes a "transitional period"?

There is absolutely no relationship between the development of ATV and the need for flexible use of ATV spectrum on an interim basis. On the contrary, this counter-intuitive proposal is detrimental to the development of ATV. First, it becomes difficult to argue that additional spectrum is integral to ATV and at the same time allow it to be used for non-broadcast purposes. If the spectrum can be used for other purposes, even on an interim basis, then the reasoning behind giving the spectrum to existing broadcasters is undermined. Certainly, the current controversy surrounding land mobile sharing at-

tests to the fact that other entities covet this spectrum. Indeed, this directly conflicts with the Commission's decision to not go forward with land mobile sharing until the ATV issue is resolved. I am convinced that the flexible use proposal fuels the argument that these entities, pursuant to their right to compete for spectrum under *Ashbacker*, have a legal right to apply for this spectrum. Litigation of this type will obviously delay, and if successful, preclude implementation of ATV.

In addition, the idea that a licensee can be allocated broadcast spectrum for the purpose of sub-licensing to other non-broadcast services conflicts with the statutory obligation that the Commission license and prescribe the nature of the service to be rendered by *each individual station*. *See* 47 U.S.C. Sec. 303(b)(c). We have recognized the legal problems associated with flexible use in other proceedings. They apply with equal force here.

The majority argues that a similar approach was followed when allowing broadcasters to use their sub-carriers for non-broadcast uses on a secondary basis. The situation presented in this *Notice* and the use of broadcast subcarriers is different. Allowing broadcasters to use their subcarriers for non-broadcast uses maximizes the physical characteristics of their broadcast signal -- no additional spectrum is given to broadcasters for the purpose of subcarrier operation. Today, we are proposing with this Notice to allot additional spectrum to broadcasters when we know that competing interests seek access to that spectrum.

The legal risks involved with the flexible use approach are exacerbated by the fact that the proposal makes no practical sense. To the extent nobody knows how long the transition period will take, it is unreasonable to expect significant investment in equipment that will use this spectrum. One can question the demand for this spectrum in such an uncertain environment. Alternatively, if there is heavy demand for the spectrum, then the Commission will have created a constituency for non-broadcast use of the spectrum. As a practical matter it will be extremely difficult for future Commissions to reclaim the spectrum for ATV service.

Perhaps the Commission should reexamine its flexible use of spectrum position. The Commission has developed allocation schemes that provide the bases for the development of communication services. Licensees have developed businesses based on the economic principle of supply and demand. In the past when the demand for services outweighed the ability to provide those services the Commission either allocated additional spectrum to that service or technology improved allowing for maximum use of the spectrum. By allowing flexible use of spectrum, the Commission is increasing the supply of spectrum available to a variety of services, while at the same time, it is limiting those who are eligible licensees for those services. For example, a broadcaster may provide a paging service on a subcarrier, however, a paging service licensee cannot have a license to operate a paging service on a broadcast allocation unless he/she first becomes a broadcast licensee. Under our flexible use schemes we may be undermining our allocation scheme. Furthermore, we may be creating an unfair and imbalanced marketplace that may be harming those licensed to operate within a service category.

Negotiated Interference

Another premature issue is that of negotiating levels of interference or service area. Here the majority is proposing that stations be able to negotiate or possibly sell the additional spectrum allocated to them for ATV purposes, to other broadcasters. In other words the ultimate decision as to whether a station in the top markets would be capable of transmitting ATV signals will depend on private negotiations between broadcasters. The Commission has raised the issue of privately negotiated interference rights in other proceedings. The legal difficulties raised in those proceedings apply equally here.

Resolving ATV spectrum problems through private negotiations raises fundamental questions regarding whether we have granted licensees "property rights" to the spectrum contrary to our statutory authority. *See* 47 U.S.C. 304. There is also a question whether privately negotiated agreements conflict with the Commission's responsibility to "assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate". *See* 47 U.S.C. 303 (c).

Moreover, the Commission, pursuant to Section 307(b) of the Act, must allocate this additional spectrum to each local community. Privately negotiated ATV rights may create an allocation plan that is inconsistent with the Commission's community based allocation scheme. For example, it is conceivable that television stations located in major urban markets would be in a position to purchase an additional three MHz of spectrum from television stations in nearby smaller communities. The possibility that the public in some communities could be denied the benefits of ATV because of the private economic interest of individual broadcasters is very troubling. Such a policy raises the possibility of redlining, where licensees negotiate away interference protection in "undesirable" areas. Privately negotiated interference agreements conflict directly with Section 307(b) of the Act which requires that the Commission distribute licenses among communities so "as to provide a fair, efficient, and equitable distribution of radio services to each of the same." Only the Commission, and not private negotiations, can ensure that the distribution of ATV is accomplished in a fair and equitable manner.

Private negotiations involving inter-band swaps of non-commercial educational television spectrum, the trading of VHF for UHF spectrum or vice versa, would be counter to Commission authority. [2] With the issue of negotiated interference, the Commission is setting the stage for a morass of legal and public policy battles that will do little, if anything, for the development of ATV systems.

Standards

Regarding the issue of standards, I would have preferred stating that the Commission will play a role in establishing a standard(s) either by selecting one or by approving an industry standard. Questions asked in this section suggest that one possible role the Commission can play is that of an interested bystander while letting the marketplace select a standard. I believe that the marketplace should be able to operate in the development stage of ATV, however, to assure the introduction of ATV service to the public a standard(s) will have to be selected. The Commission has a fundamental role to ensure ATV does not travel the road of AM stereo.

Conclusion

ATV is the most significant video development since the invention of color television. The potential impact of ATV on the American economy has been estimated in the billions of dollars. The manufacture of ATV television sets could possibly revitalize the domestic consumer electronic industry. The implications of this technology go far beyond a "better" picture.

Given the importance of this issue, I simply cannot understand the majority's decision to foreclose the possibility that additional spectrum may be needed for the development of this technology. This is especially true where the decision was based on theoretical models and hypothetical spectrum assumptions. Moreover, there is absolutely no justification for adding on allocation issues, such as flexible use and negotiated interference policies. There is nothing in logic or fact to indicate that these issues are necessary for the development of ATV. On the contrary the legal and technical problems associated with these "solutions" will impair development.

Much has been written in recent years about the need for America to improve its competitive posture in the highly competitive world market. The Commission has a responsibility to foster a climate that is conducive to the development of new competitive technologies that will benefit the viewing public. I would have hoped we learned from our AM stereo proceeding, that pursuit of purely ideological marketplace solutions to real-world technological issues simply does not work. I fear that this proceeding has become another vehicle to promote favored policies of marketplace spectrum management – flexible use and negotiated interference rights. Including these issues in this proceeding serves no useful purpose and most likely will thwart advancement of ATV technology. Despite these problems, I believe the Commission is committed to the development of a terrestrial ATV service. I urge commenters to focus their energies on the real issue - the spectrum needs of an operational ATV system.

FOOTNOTES FOR STATEMENT

[1] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The granting of an application for a broadcast license that is mutually exclusive with another, without considering the merits of the other application at the same time, deprives the other of the opportunity for a hearing as guaranteed by Section 309 of the Act.

[2] Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. 100-459, Oct. 1, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-265

In the Matter of

Amendment of Subparts A and E
of Part 95 to Improve the
General Mobile Radio Service
(GMRS).

REPORT AND ORDER

Adopted: October 13, 1988; Released: November 10, 1988

By the Commission:

I. INTRODUCTION

1. On July 16, 1987, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] in the above-captioned proceeding. In the *Notice* we proposed to modify the General Mobile Radio Service (GMRS) Rules to increase the flexibility of the GMRS for personal communications. Our objective was to make the service more efficient and effective for personal users.

2. The keystone of our proposal was to limit eligibility for obtaining a new GMRS system license to individuals in order to encourage personal uses and discourage large commercial operations.[2] We also proposed (1) to provide for greater transient use of mobile relay stations (repeaters) by broadening station operator eligibility; (2) to eliminate the need to re-license a GMRS system in order to change the transmitting channel; (3) to define and provide for the small base station, a new class of land station in GMRS systems; and (4) to authorize new interstitial channels. In response to the *Notice*, we received fifty-two comments [3] and fourteen reply comments.[4] The comments were generally supportive but varied widely on specific details. Most of the comments were filed by individuals and organizations representing personal users and volunteer public service groups. They generally supported our goal of enhancing the GMRS for the personal user, although most public service groups sought different types of alternative eligibility options in addition to eligibility for individuals. The few comments we received from individuals and organizations representing commercial users were generally opposed to this rule making on the basis that it would have an adverse impact on the Part 90 Private Land Mobile Radio Services.[5]

II. BACKGROUND

3. The GMRS is one of the three personal radio services contained in Part 95 of the Rules. The GMRS rules, however, permit both personal and business communications. The GMRS, originally the Citizens Class A Radio Service, was created some 40 years ago for use by individuals and entities who were not eligible for licenses in the public safety, industrial and transportation services. The regulatory structure of the GMRS was patterned after a traditional view of a land mobile system: a base-to-mobile dispatch operation transmitting on an assigned shared channel in a specific geographic location. Later, as repeater stations were incorporated into Part 90 private land mobile systems, so too were they incorporated into GMRS systems. This has resulted in a very broad mix of GMRS system licensees: personal users, volunteer public service groups and small and large commercial organizations. The diverse operating patterns of these users often result in major incompatibilities, particularly between large commercial organizations and personal users. In areas of large population density use of the eight available GMRS channel pairs by high-traffic-volume commercial dispatch operations often effectively precludes personal use.[6]

4. Further, as presently structured, the GMRS rules limit the flexibility of users to take advantage of new technology and equipment. For example, under the present rules GMRS users cannot use the repeaters of other GMRS systems without first obtaining a modification of their licenses. Under the proposed rule changes, GMRS users could utilize hand-held transceivers to communicate with family members and associates, not only throughout their own GMRS system coverage area, but also while they are traveling throughout the coverage areas of other GMRS systems.

5. When family members who are station operators in one GMRS system travel to another city, they often want to enjoy the same intercommunication capability they have in their home area. Such communication is known as transient operation. Current rules permit station operators from one GMRS system to intercommunicate anywhere the Commission regulates communications. They must, however, confine their intercommunication to the channel assigned to their home GMRS system and may only use simplex (non-repeated) transmissions. They can communicate with station operators in other GMRS systems that share their home GMRS system channel, including repeater transmissions, but they are prohibited from using repeaters in other GMRS systems to intercommunicate with station operators from their own GMRS system unless they have obtained a modification of the licenses. These requirements are unwieldy and, for all practical purposes, preclude effective transient operation.

6. We have expressed a continuing concern that personal communications needs be adequately met. The Citizens Band (CB) Radio Service provides short-range communications capability, with low power and low antenna height. Because of its propagation characteristics, however, CB radio is not suited to many traditional communications options desirable for personal users, such as repeaters. We have sought alternatives for personal users who seek a more complete communications package. In General Docket No. 83-26, we terminated a proceeding that proposed to provide directed communications at 900 MHz for personal users after deciding to use that spectrum to address other communications needs.[7] In PR Docket No. 86-38, we terminated an inquiry to determine whether to restructure the GMRS into a new Consumer Radio Service after concluding this restructuring would unduly disturb the existing service.[8] We indicated our intention, however, to initiate a proceeding at a later date to determine whether specific improvements to augment personal use in the GMRS would be desirable. This pro-

ceeding is the fulfillment of that commitment. In the paragraphs below, we will discuss each major issue raised in the *Notice* and the comments received in response.

III. DISCUSSION

A. License Eligibility

7. *Proposal.* In the *Notice* we proposed to limit the eligibility for new GMRS system licenses to individuals in order to focus the usage of the very limited number of GMRS channels (8 channel pairs) toward the needs of the personal user. We stated that, unlike the restrictive eligibility requirements of the Part 90 radio services, the eligibility requirements for personal radio services are virtually unrestricted except for requirements of minimum age and the statutory requirement that the licensee not be a representative of a foreign government. Commercial organizations are eligible for systems in other private land mobile radio services having comparable communications performance capability (repeaters, FM quieting and capture, freedom from "skip," etc.). Personal users, on the other hand, generally are not eligible in the other private land mobile services.[9] There are no comparable alternatives to the GMRS for the personal user.

8. We did not propose to terminate business communications in the GMRS. While the proposed licensing requirements would discourage large business users, small businesses with few employees could still find the GMRS attractive. Further, recognizing that roughly one-half of all GMRS system licensees[10] are commercial organizations, we proposed to grandfather those commercial user GMRS systems that were licensed before July 31, 1987. These systems, however, would have to remain configured as currently licensed. No changes would be authorized to such grandfathered systems. We advanced this proposal to encourage the large commercial organizations to relocate their systems to the Business Radio Service.

9. *Comments.* The largest number of comments were received from personal users and personal user groups. They supported the proposal to license new GMRS systems only to individuals. Their position is best summed up by the following statement of the Personal Radio Steering Group, Inc. (PRSG):

> Commercial and organizational entities should license not in the limited amount of spectrum which remains for personal, private radio communications, but rather in that 96% of the original spectrum which was set aside specifically for business operations in Part 90. The GMRS must be preserved for personal licensing by citizens who have no other comparable communications alternative.[11]

10. Commercial users and organizations representing business users opposed the proposal. Carl J. Schlueter (Schlueter), a business radio system entrepreneur, summed up a general lack of regard for the personal radio services that permeated business user comments, stating that personal communications are only for people unwilling to join an amateur radio club.[12] The National Association of Business and Educational Radio, Inc. (NABER), saw our proposal as a restructuring of the GMRS into a form virtually identical to that proposed for the Consumer Radio Service by the Commission in PR Docket No. 86-38.[13] NABER went on to state its specific concerns:

> NABER believes the result of the Commission's actions will be to increase the spectrum demand in the Business Radio Services as the unavailability of GMRS will cause certain of those users to become licensed in the Business Radio Service. This will not only increase congestion on such frequencies but also could result in less radio system discipline as users engage in personal conversation on such frequencies . . . . The Commission's decision will therefore have a significant spectrum impact on users of frequencies which have a much higher priority than a mere "consumer service."[14]

11. Business users also exhibited concern about the sufficiency of the proposed grandfathering provisions for existing non-individual licensees. The Land Mobile Radio Section, Information and Telecommunications Technologies Group, of the Electronic Industries Association (EIA-Land Mobile), expressed these concerns:

> Under proposed Section 95.5(b) grandfathered licensees could not make any changes to power, antenna height, station location, or any additions of base stations or mobile units. The Section believes these limitations are overly restrictive.[15]

EIA-Land Mobile pointed to inability to relocate transmitter sites and inability to increase the number of mobile units as restrictions that were contrary to the public interest.

12. Volunteer public service groups and organizations that currently use the GMRS in their activities expressed concern about their licensing and communications options if this proposal were adopted. EIA-Land Mobile, speaking for such organizations, stated:

> The Commission apparently has overlooked the multitude of users who are not classified as individuals but whose operation on GMRS serve the public interest. For example, volunteer community service organizations such as neighborhood watch groups or volunteer fire and rescue groups in less urbanized areas use GMRS to communicate. As a practical matter, to license such activities under the organization rather than the individual is often the only sensible solution, because the volunteer activities will continue even after a given individual leaves the organization.[16]

Most public service organizations generally supported the reduction of business use of the GMRS. They did not oppose the concept of eliminating the licensing of commercial entities. They sought instead to obtain exemption from the general rule that non-individuals could not be licensed. Some comments proposed that public service organizations should be allowed to obtain GMRS system licenses in addition to individuals. Others proposed that 501(c)(3) organizations under the Internal Revenue Code should be allowed to obtain GMRS system licenses in addition to individuals.[17] Still others recommended ex-

panding the concept of station operator to accommodate the operation of public service organizations.[18] On the other hand, PRSG stated:

> This change would not significantly impact public-service-team operations. Members of public-service teams would continue, just as present, to be eligible to license for GMRS communications, and to operate under their individual licenses for team activities.[19]

13. *Discussion*. We concur with the majority of commenters that supported the proposal to limit licensing of GMRS systems to individuals. As a personal radio service, GMRS should not be compromised for the benefit of commercial users at the expense of personal users. Business communication needs, particularly the needs of large-volume dispatch operations, should be satisfied through the use of communications alternatives other than GMRS. Licensing new GMRS systems to individuals will encourage personal and small business use while discouraging large commercial operations. We emphasize again that this change will not preclude or otherwise limit business communications from being transmitted by GMRS licensees.

14. We specifically reject a content regulation approach to enhancing personal use in the GMRS. Discontinuing business communications would unnecessarily disrupt the GMRS. It would not be in the public interest to prescribe in detail the types of communications that could be conducted by GMRS users. Indeed, some personal users may find that the GMRS suits their needs to accomplish infrequent communications for a small business. Those individuals eligible for a new GMRS system license may find the service entirely suitable for both their personal and small business communications. We do not want to discourage these uses.

15. Under the existing rules, individual licensees of GMRS systems could allow employees to be station operators without obtaining their own GMRS system licenses. This is consistent with a commercial dispatch regulatory approach, and grandfathered commercial GMRS systems may continue to permit employees to be station operators consistent with our former rules. Under the new rules that apply to GMRS systems licensed to individuals, however, such an approach would frustrate the new regulatory framework based upon responsibility for one's own communications as an individual GMRS system licensee. Therefore, employees may not be station operators of GMRS systems licensed to individuals unless they have their own GMRS system licenses.

16. We seek to discourage the proliferation of what are typically Part 90 uses of the GMRS. The GMRS is not and should not become the "other" Business Radio Service. Many commenters point out that adoption of our proposal will eventually cause certain GMRS systems of commercial organizations to become licensed instead under Part 90. This is our intention; however, as proposed we will grandfather all existing GMRS systems licensed to entities other than individuals. No system would have to move. Growth, however, would have to be accommodated elsewhere. We believe this is a fair compromise between the needs of present licensees and the objectives of the GMRS.

17. Schlueter contended that the personal user communications we seek to address more fully in the GMRS should instead be reaccomodated in the Part 97 Amateur Radio Service. We do not agree. Many types of personal communications permitted in the GMRS are prohibited in the amateur service. Personal communications in the GMRS often include conducting personal business. Business communications, however, are prohibited in the amateur service.[20] The amateur service is for self-training, intercommunication and technical investigation carried on by technically qualified persons solely with a personal aim and without pecuniary or business interests.[21] Thus, the amateur service is unsuitable for typical GMRS personal communications that involve business matters, such as discussions of purchases. It would be unreasonable and illogical to require all members of a family to pass amateur operator license examinations in order to conduct only a portion of the intercommunications they now conduct in the GMRS.

18. NABER expressed concern that our proposals could result in a restructuring of the GMRS into the form envisioned for the Consumer Radio Service in PR Docket No. 86-38. The purpose of the Consumer Radio Service was to allow for one person to contact another person over a short distance and conduct a brief voice conversation. Abolition of repeaters, reduction of maximum authorized power, and the adoption of complex standardized algorithms and protocols in the GMRS were all considered in PR Docket No. 86-38. That proceeding proposed a complete technological restructuring of the GMRS. Its scope far exceeded the scope of this proceeding.

19. Some commenters sought separate licensing eligibility for volunteer public service teams such as REACT (providing CB Channel 9 response) and neighborhood watch groups if we adopt general rules limiting GMRS systems to individuals. We recognize and appreciate the additional communications assets these organizations bring to bear in times of emergency. There is no way to create an exemption for them, however, without serious risk of compromising the new eligibility requirements.

20. Even strict applications screening cannot prevent licensing of organizations with benevolent-sounding names purporting to have some apparent public service function formed for the real purpose of providing communications to commercial entities no longer eligible under the rules.[22] Licensing only organizations with tax exempt status in addition to individuals is not a solution, either.[23] There is nothing inherent in tax exempt status that uniquely qualifies or recommends an entity with such status for special licensing consideration in the GMRS.[24] Volunteer public service teams related to CB and GMRS make up less than one-third of one percent of the hundreds of thousands of tax exempt organizations.[25]

21. Abolition of club and RACES (Radio Amateur Civil Emergency Services) station licensing and requiring individual licensing in the Part 97 Amateur Radio Service has not placed any inordinate burden on amateur radio team contributions to community safety and welfare, especially in times of local emergency.[26] Similarly, under the new GMRS rules, REACT and neighborhood watch teams should be able to operate as they do now with each of their individual members licensed for their own GMRS systems. We conclude that members of volunteer public service groups that do not have individual GMRS system licenses must obtain them, unless that particular group is grandfathered.

B. Improved Transient Operation

22. *Proposal.* In line with our intention to make the GMRS more efficient and effective for personal users, we proposed to model repeater usage in the GMRS more closely after repeater usage in the amateur service. A salient characteristic of amateur service repeater operation is extensive transient use. We proposed, therefore, to permit use of a GMRS system repeater by station operators of GMRS systems licensed to individuals who have the permission of the GMRS system licensee whose repeater is being used. The persons eligible to be station operators in a GMRS system would include the members of the licensee's family for whom the licensee is willing to take responsibility. We also proposed to construe as open and available for transient use any GMRS system repeater that does not employ some technical means to limit user access to the repeater, such as tone operated squelch or digital access codes. We requested comment on the merits of this approach versus the need to require GMRS system licensee permission for transient use of repeaters.

23. *Comments.* Comments on this proposal were mixed. A large number of commenters, including EIA-Personal, supported the proposal. EIA-Personal stated that our proposal to allow transient use of any GMRS repeater follows the spirit of improving the GMRS for personal users.[27] PRSG also agreed in principle:

> The current GMRS rules place unnecessarily burdensome restrictions on the use of repeaters by travelers. A system for disciplined transient use of repeaters outside a licensee's authorized "home" area of operation has long been sought.[28]

PRSG did, however, recommend separate licensing for repeaters and addition of the concept of a "repeater manager" to the rules in order to accomplish this objective.

24. Conversely, there were those who opposed any form of transient repeater use other than within the framework of cooperative shared use or multiple licensing arrangements. NABER was concerned that our proposal did not consider the numerous alternatives for personal users, such as cellular service, IMTS (Improved Mobile Telephone Service), pagers and pay telephones along the highway.[29]

25. PRSG and many commenters opposed presuming that open repeaters constitute implied consent to transient use. PRSG stated:

> We agree with the proposed rules (§ 95.53(c) and §95.57(b)); that is, we think a PMRS licensee should be able to use *any* repeater *with the permission of the manager* of that repeater. We disagree with the FCC's own announced interpretation of its proposed Rule that any repeater which just anyone can bring up is automatically theirs to use. We believe the user must have specific permission of the repeater manager to use it.[30]

All commenters focused on the issue of the method by which the GMRS system licensee would give permission for use of the repeater. Written documentation and oral permission were suggested. Some supported the notion that an open repeater constituted tacit permission to use it. Still others recommended technological solutions, such as a common transient-user CTCSS (Continuous Tone Controlled Squelch System) encoding.[31] PRSG's primary concern was that the Commission's expressed interpretation of the rules requiring permission to use a GMRS system licensee's repeater would emasculate the ability of a GMRS system licensee to revoke or deny permission to use that licensee's mobile relay station.[32] In light of this, PRSG ultimately took the following position:

> The answer is not to mandate transient use, irrespective of the system licensee/owner/ manager's wishes, but to permit the system licensee/manager to allow such use on a case-by-case basis by those persons and under those conditions permissible under the rules. Clearly a written agreement satisfies both the existing Rules and the principles above. We suggest that oral permission over the air would facilitate desirable transient use without compromising either the licensee/manager's control over the system or any of the *control* Rules previously discussed. A system of oral permission would automatically further permit a means later to rescind or to restrict use of the system. Such capability is vital to true, actual and effective control of a station.[33]

26. *Discussion.* Based on the comments, we conclude that the flexibility of personal communications in the GMRS would be greatly improved through the proposed relaxation of station operator eligibility requirements. This relaxation of the rules would facilitate transient use of repeaters and greatly increase the convenience and usefulness of the GMRS to individuals. To that end we are adopting the rules we proposed.

27. We are adopting rules to liberalize station operator eligibility. The purpose of these rules is to increase the convenience and usefulness of GMRS systems licensed to individuals. Thus, the liberalized station operator standards will not apply to grandfathered GMRS systems licensed to commercial entities. *See, infra*, paragraphs 66-71. Also, the old GMRS rules placed message content restrictions upon each station operator, depending upon the station operator's relationship to the licensee. For example, employees of a commercial entity licensed for a GMRS system could only use that entity's GMRS system for messages related to that licensee's business. As proposed, we are abolishing these message content regulations with respect to GMRS systems licensed to individuals. Any individual station operator (*i.e.*, GMRS licensee or family member) may engage in any communication.

28. We are also adopting rules to allow the station operators of GMRS systems licensed to individuals to use mobile relay stations in other GMRS systems with the permission of the licensees of the other systems. Of course, both systems must be authorized for the channel or channel pair used for such a communication. In the *Notice* we took the position that we would prospectively construe these rules to mean that any GMRS open repeater would be a repeater for which the GMRS system licensee had given tacit permission for such transient use. We are persuaded by the comments, however, that such a construction does not allow a GMRS system licensee sufficient latitude to restrict the users of that system to those operators the licensee desires. This then impinges on the licensee's ability to adequately discharge required control functions under the Rules.

29. Therefore, we are adopting rules requiring system licensee permission before engaging in transient use of another system's mobile relay station; however, we decline to implement our proposed construction of these rules to allow transient use of any open GMRS repeater. Instead, we will construe these rules as requiring the specific permission of the GMRS system licensee. We are not adopting rules delineating the different types of possible specific permission -- this would constitute unnecessary regulatory burden. As PRSG stated in its reply comments, however, clearly both written agreements and oral permission over the air would be acceptable methods of establishing that such permission had been granted. Additionally, closing one's own repeater to prevent undesired use, such as by tone-operated squelch or digital access codes, and limiting those to whom these codes were available, would appear to be another means to establish who has permission to use a licensee's repeater. This mechanism would avoid disputes regarding repeater operations. We consider this to be the most efficient, most cost-effective and least burdensome approach to improving transient GMRS operations, and encourage its use.

30. PRSG suggested that we institute a "repeater manager" concept. This would constitute unnecessary and burdensome regulation in the form of an additional licensing requirement. Additionally, we are not adopting rules suggested by commenters for a common transient-user CTCSS tone because such a regulatory mandate could impose unwarranted economic burdens by requiring the purchase or additional equipment or modification of existing equipment to employ such a tone in order to engage in transient use. A voluntary standard among licensees, however, would be permissible.

C. All - Channel Operation

31. *Proposal.* We proposed rules to permit each GMRS system licensed to an individual to use the best channel available for its stations at any given time and place. Currently, each GMRS licensee normally receives authorization for one specific shared channel or channel pair at one specific location. A personal user is unable to communicate if the channel assigned to the GMRS system is busy, even if other channels are clear. When traveling, the personal user is confined to the channel of the home GMRS system. To use a different channel, the GMRS system licensee has to obtain a license modification. To do this, the GMRS system licensee must request another specific channel on the application form. Such license modifications are routinely granted. No coordination is required.

32. Under our proposed rules, no license modification would have been necessary in order to change the channel. We proposed these rules to permit more efficient and effective personal use of the GMRS spectrum by giving the GMRS system licensee the ability to use immediately any available clear channel or channel pair.

33. The rules as proposed would have limited the channel selection options to one channel or channel pair for all stations in a GMRS system at any given time. In other words, even though all channels were available, a single GMRS system would not have been permitted to use two or more GMRS channels or channel pairs simultaneously. In the text of the *Notice* we also sought comment on whether we should consider trunking if we eliminate designation of a specific channel on the license.

34. *Comments.* The comments on this subject were also mixed. EIA-Personal was typical of those who commented favorably:

> The Section believes the proposed expansion to use of "any available clear channel or channel pair" is a significant step forward to easing both the licensing burden of the system licensee as well as offering enhanced flexibility to the transient system user.[34]

On the other hand, EIA-Land Mobile expressed a concern shared by the Special Industrial Radio Service Association, Inc. (SIRSA):

> The Section is concerned that such action would encourage the proliferation of user programmable transceivers, which could cause interference problems on private land mobile 450-470 MHz channels.[35]

35. PRSG opposed all-channel operation, but advanced what it called the "two-channel plus 675" concept as an interim solution "responding to today's problems with today's technologies."[36] It recommended that all GMRS systems licensed to individuals be assigned two requested channels or channel pairs, and that an additional nationwide channel pair (462.675 MHz/467.675 MHz) be made available for emergency and traveler assistance communications. PRSG opposed eliminating Commission channel assignment in the GMRS because:

> The NPRM's "all-channel" proposal would "CB-ize" the PMRS and lead to its eventual degeneration into chaotic and trivial communications.[37]

Of those commenters requesting some sort of multi-channel allocation, approximately 62 percent supported the two-channel plus 675 concept, and SIRSA embraced it as a solution that made sense short of user-programmable transceivers. The comments generally opposed trunking, even if we were to abolish Commission assignment of channels.

36. While most commenters addressed the elimination of Commission channel assignment in the GMRS from the perspective of mobile station users, some did address the question of repeater station operation. PRSG indicated its desire for separate repeater licensing and greater Commission regulation of repeater access, and, in this context, opposed the all-channel concept for repeaters:

> At the most permissive end, repeaters themselves could be allowed to switch frequencies. At this extreme, all reasonable efforts at repeater coordinating, especially with regard to CTCSS selection and use, would break down into chaos.[38]

37. *Discussion.* Upon further review of our proposal, we agree with PRSG and other commenters that elimination of Commission assignment of channels and channel pairs to GMRS systems would be too drastic a step to take at this time. Instead, we are adopting in principle the two-channel plus 675 concept advanced by PRSG as an alternative. This alternative provides much of the flexibility we

sought in advancing the all-channel concept, but at the same time preserves the current nature of the GMRS primary channels and channel pairs in order to allow for a more gradual and user-acceptable application of existing and new technologies in the GMRS.

38. We are adopting rules that allow the mobile stations of any GMRS system that is not specifically assigned the 462.675 MHz/ 467.675 MHz channel pair to use this channel pair for emergency communications or traveler assistance. This would allow each GMRS licensee to communicate on the frequency most commonly used nationally in the GMRS by volunteer public service teams for emergency and traveler assistance communications.[39]

39. We are also adopting rules to permit two channels or channel pairs to be assigned to a GMRS system licensed to an individual. Granting a second channel or channel pair upon request provides each GMRS system with additional flexibility without severely disrupting current rules or licensing policies.

40. We choose the two-channel plus 675 concept over the all-channel proposal largely because the two channel plus 675 alternative, when combined with the other actions we are taking, *infra*, is a less drastic means to achieve the same objectives we focused upon in the *Notice*. A GMRS system licensed to an individual may have two FCC-assigned channels or channel pairs, an additional nationwide channel pair (462.675 MHz/467.675 MHz), and seven interstitial channels. We expect this to result in manufacturers offering equipment having these capabilities. The principal unit model we envision is that of a hand-held transceiver for use in GMRS systems licensed to individuals. These transceivers would transmit with an output power of less than 5 watts effective radiated power. They would provide the station operator with the ability to select by switch or keypad from the transmitting channels authorized to the GMRS system, the seven 462 MHz interstitial channels, the 462.675 MHz/467.675 MHz nationwide channel pair and the primary channel(s) or channel pair(s) assigned to the system. We expect that access to this number of channels will promote more efficient spectrum utilization and minimize current user inconvenience caused by our normally assigning only one channel or channel pair.

41. While we are not adopting the all-channel rules we originally proposed, we anticipate that taking the interim two-channel plus 675 approach may ultimately foster the development of some sort of fully automated user-transparent GMRS technology. Nonetheless, it would be premature to launch a technically sophisticated attempt to allow frequency-agile repeaters or trunking in the GMRS at this time.

42. We share the concerns of SIRSA, EIA-Land Mobile and others with respect to possible proliferation of illegal user-programmable equipment in the private land mobile services. These concerns are equally valid under the two-channel plus 675 concept that we have embraced, particularly because seven interstitial channels will also be available for mobile station and small base station use. *See* paragraphs 56-64, *infra*. Therefore, we intend to take two additional steps to assure against the proliferation of unauthorized user-programmable equipment.[40] First, we will not type accept a GMRS transmitter that can transmit in spectrum assigned to another service unless it is also type-accepted for use in that other service. Second, we will require that the mechanism for installing or programming the assigned channel frequencies into all transmitters type accepted for use in GMRS systems be internal to the transmitter and inaccessible to the station operators. Our intent is that the GMRS system licensee will make, or cause to have made, the necessary internal installation or programming of the assigned channels such that only the channels authorized to the GMRS system are available to the station operators for their selection.

43. It should be noted as well that we have already adopted rules regarding type acceptance in Part 90 to address this concern.[41] Also, the Technical Rules in Subpart E of Part 95, 47 C.F.R. Part 95, Subpart E, specifically provide:

> No control, switch or other type of adjustment which, when manipulated, can result in a violation of the rules shall be accessible from the transmitter operating panel or from the exterior of the transmitter enclosure.[42]

Thus, a GMRS system licensee may not cause a GMRS transceiver to transmit if the licensee may select channel(s) or channel pair(s) other than those authorized by use of front panel controls or controls exterior to the transmitter enclosure.

44. With respect to PRSG's comments seeking repeater regulation centered around assignment or control of CTCSS tones, we note that we do not currently require coordination of GMRS repeater stations before system licensing. Nor are we aware of any unified effort on the part of GMRS licensees or the GMRS industry to foster any voluntary repeater coordination. We encourage voluntary efforts to assure that licensees of repeaters do not interfere with one another. We also encourage the use of CTCSS tones or digital control where a licensee desires to "close" a repeater. We again emphasize that we encourage reliance on technical as opposed to regulatory means to achieve spectrum harmony and efficiency in the GMRS, particularly in the area of repeater stations.

D. Small Base Stations

45. *Proposal.* There are two different types of GMRS stations: mobile stations and land stations. A mobile station is one or more units that transmit while moving or during temporary stops at unspecified points. A land station is a unit that transmits only from an exact point shown on the license or an unspecified point within an operating area as shown on the license, for a temporary period. There are four different land station classes: base stations, mobile relay stations, control stations and fixed stations.[43]

46. Many GMRS personal users only acquire and operate one or more mobile units. The current rules place constraints upon a personal user who on occasion wants to operate a mobile transmitter from a fixed location, such as the home or office. We proposed to create a new type of base station called a small base station to accommodate this requirement. Licensing requirements for this type of base station would be considerably less detailed than those for a typical base station.

47. The concept of the small base station is largely based upon the existing small control station.[44] Nonetheless, we proposed a different maximum power limitation for small base stations. Small base stations would be limited to a maximum effective radiated power (ERP) of 5

watts. Small control stations may employ up to 50 watts ERP unless they transmit north of Line A or east of Line C, in which case they are also limited to 5 watts ERP. We proposed to limit small base stations to a maximum of 5 watts ERP regardless of geographic location. This should be sufficient for the limited intended local use. Moreover, allowing small base stations to transmit with high power at the reduced frequency tolerance we proposed could greatly increase interference potential if they are authorized to transmit on interstitial frequencies.

48. A small base station would employ an antenna no more than 20 feet above the ground or above the building or tree on which it is mounted. To facilitate use of low-power "mobile" equipment as small base stations, we proposed to permit small base stations the frequency tolerance currently allowed for mobile stations (0.0005%), rather than the frequency tolerance currently required for base stations (0.00025%). We believed this was an acceptable tradeoff to achieve personal user flexibility. Small base stations would employ at a maximum no more than one tenth the power available to other land stations, and therefore would not require as tight a frequency tolerance.

49. *Comments*. Virtually all of the comments that addressed the proposal regarding small base stations supported the concept. For the most part, they agreed with PRSG that the small base station proposal would meet communications needs of many users and reduce paperwork burdens.[45] Focusing on the difference in maximum power authorized for small base stations and small control stations, PRSG recommended that we extend a 5 watt ERP power limit to small control stations as well, regardless of geographic location. PRSG also advocated that we rename small control stations as small access stations.

50. *Discussion*. Small base stations are unlikely to cause significant interference to other lawful uses and users. Allowing small base stations will encourage GMRS users to utilize short range equipment so that more users can be accommodated. Therefore, we are adopting rules to allow GMRS systems licensed to individuals to use small base stations. We are not adopting rules to modify the nature of small control stations. We will first study the impact of small base stations and then evaluate the need for further rule changes.

51. A small base station may operate on the primary 462 MHz channel(s) assigned to the GMRS system for the small base station as requested. In addition, a small base station may operate on any of the new interstitial channels.

E. Simplex Channels

52. *Proposal*. We asked for comments regarding the need to minimize harmful interference to repeater channels, and whether we should consider discouraging or prohibiting simplex operation on repeater mobile input channels. We did not, however, make any specific proposals on this subject.

53. *Comments*. Twenty eight comments and reply comments addressed this issue. All but one requested the Commission to prohibit simplex operation on repeater input frequencies in the GMRS. In order to accomplish this, PRSG recommended that "the 467 MHz frequencies should be reserved solely for the activation and control of repeaters."[46]

54. *Discussion*. Some GMRS systems are configured as two-frequency direct operations involving a base station transmitting on 462 MHz and receiving on 467 MHz, and one or more mobile stations transmitting on 467 MHz and receiving on 462 MHz. This configuration provides for dispatch systems in which the mobile stations have no need for (or the licensee does not want the mobile stations to have) communication with one another. Generally, such a system does not include a second 462 MHz receiver at the base station for monitoring purposes. Without such a receiver, a system so designed inherently prevents the base station from monitoring the 462 MHz frequency before transmitting. Certain GMRS systems that have repeater stations controlled by wireline, or that have transceivers at one location serving both repeater and base station functions, also often suffer from the same deficiency because the operator by remote wireline control or at the on-site control point is not able to effectively monitor the 462 MHz frequency of the channel pair.

55. Some GMRS systems also include mobile-to-mobile station operations on the 467 MHz frequencies. In this configuration all parties to a communications exchange between mobile stations both transmit and receive on a 467 MHz frequency. Unfortunately, that 467 MHz frequency can also be assigned to a GMRS system as one of two frequencies forming a channel pair for repeater (mobile relay) station operation. GMRS system applications that include repeater operation generally request (and we normally assign) a 467 MHz frequency for mobile station transmission for the purpose of repeater input and a 462 MHz frequency for repeater output. Mobile stations engaged in simplex operations on repeater input frequencies rarely monitor a repeater's paired 462 MHz output channel. Moreover, mobile stations are far less capable of receiving other co-channel transmissions than are more advantageously sited repeaters. As a result, they are often unaware of any pre-existent or more urgent ongoing communications being conducted through a repeater.

56. For all of the above reasons, we agree with the comments that significant interference to GMRS repeater operation is virtually inevitable due to non-repeater operations conducted on 467 MHz frequencies.[47] We further agree that the best solution is to prohibit simplex operation on the input frequencies of GMRS repeaters. We are, therefore, adopting new Section 95.29(a)(3) restricting 467 MHz channels to accessing and controlling mobile relay stations. *See* Appendix A, *infra*. We have chosen, however, to postpone the effective date of this particular action until December 31, 1993. This is to give GMRS licensees involved in two-frequency direct operation or mobile-to-mobile station operation on 467 MHz frequencies sufficient time to reconfigure their GMRS systems or otherwise reaccommodate their communications needs.

F. Adding Interstitial Frequencies

57. *Proposal*. We proposed the addition of three interstitial (12.5 kHz offset) GMRS channels in the 462 MHz frequency band to facilitate personal communication. We proposed these channels to satisfy the need for short-range GMRS communications that do not require use of a repeater.

58. The direct communications range of a UHF transceiver is roughly line-of-sight. Thus, for other than line-of-sight operation, communications need to be transmitted through a repeater to increase the range. Current GMRS rules provide for such operation. Many short-range

personal communications exchanges, however, can be conducted without a repeater using low power stations transmitting on interstitial GMRS channels.

59. We also proposed that four interstitial channels be established in the 467 MHz frequency band. We proposed to restrict transmissions on these channels to low power one-way non-voice communications solely for repeater control.

60. *Comments.* Almost all the comments received on this subject supported the concept of introducing interstitial frequencies in the GMRS. PRSG stated that interstitial frequencies would be a welcome improvement to the GMRS for low-power communications by mobiles (especially hand-held units) and small base stations. The commenters expressed the view that the interstitial frequencies would provide every personal licensee with new frequencies for short-distance direct (non-repeater) communications without being interfered with by repeaters or powerful base stations operating on the current primary 462 MHz frequencies.[48]

61. EIA-Personal and EIA-Land Mobile expressed concern regarding the possibility of interference to and from stations operating on the proposed interstitial frequencies. EIA-Personal stated:

> Modulation products of such transmitters might be expected to produce interference to primary channel operation, and the modulation products of full power mobile, base, and repeater stations certainly have the potential for interference with the interstitial receivers on the lower frequencies.[49]

EIA-Land Mobile concurred and advanced calculations in support of the proposition that splatter interference from the proposed offset operations would substantially reduce the useable service area of GMRS stations.[50] PRSG in its reply comments discounted the validity of these statistics on the basis that they assumed a worst case scenario - - namely, that all the transceivers used in the calculations are operating at the nominal maximum limits of both transmitter and receiver tolerance.[51]

62. The balance of the comments discussed how many interstitial channels should be authorized, and for what types of operation. PRSG supported release of the three 462 MHz interstitial channels proposed but recommended that we release only two of the four 467 MHz interstitial channels proposed.[52] The rest of the comments were mixed, but generally supported the NPRM.[53] Many of the comments specifically favored more interstitial frequencies than we proposed for simplex operation and small base stations, and control.[54]

63. *Discussion.* Because we are adopting rules to prohibit simplex operation on the input frequencies of repeaters, effective in roughly five years, we have decided not to release any of the 467 MHz interstitial channels at this time. Premature release of the 467 MHz interstitial channels may compromise the evolution of repeater technology in the GMRS. For example, currently fallow interstitial channels at 467 MHz could allow for development of narrow-band technology in the GMRS, such as the linear predictive coding advanced by PRSG in RM-5058. Development of these interstitial channels immediately would foreclose opportunity for users and manufacturers to build upon our decision to change the nature of 467 MHz use in the GMRS in 1993. In order to maximize the options of the GMRS community to present to us a comprehensive plan for a new evolutionary step in GMRS repeater usage, we decline at this time to release any of the 467 MHz interstitial frequencies.

64. On the other hand, the Notice sought to provide for direct (non-repeater-assisted) communications that do not risk substantial interference from repeater operation by proposing release of several 462 MHz interstitial channels for low-power use by mobile stations and small base stations. The comments indicate that it is desirable to provide additional channels for personal communications exchanges that can be conducted without a repeater. Moreover, releasing all seven of the 462 MHz segment interstitial channels for the use of mobile stations and small base stations in GMRS systems licensed to individuals would provide any GMRS systems licensed to individuals that are displaced by the prospective 1993 changes at 467 MHz with a GMRS alternative for their communications needs.

65. Accordingly, we are releasing all seven 462 MHz interstitial channels for use by mobile stations and small base stations in GMRS systems licensed to individuals. We do not agree with EIA-Land Mobile's assessment that interstitial channels will cause splatter interference and reduce area coverage. We concur with PRSG that this assessment is based upon transceiver operation at the nominal maximum limits of both transmitter and receiver tolerance, and that this is an unlikely worst-case scenario.

G. Grandfathered GMRS Systems

66. On September 17, 1987, we released a Public Notice further explaining the policies for GMRS systems that would be grandfathered under the proposed rules.[55] In the *Notice of Proposed Rule Making*, we proposed that GMRS systems licensed to non-individuals on or before July 30, 1987, would be grandfathered. The Public Notice clarified that pending adoption of the proposed rules, we would continue to grant GMRS systems to non-individuals. Should the proposed rules be adopted, however, GMRS system licensees granted to non-individuals on or after July 31, 1987, would become subject to the new rules at the expiration of the license terms and, hence, would not be renewed. We further stated that GMRS systems licensed to non-individuals that were substantially modified after July 31, 1987, would be considered newly licensed as of the date of grant of such modification by the Commission. The Public Notice indicated that any modification to increase the power of any transmitter, increase the number of mobile units, add any stations, increase any antenna heights, change any land station location, or change any area of operation would constitute a substantial modification. Any such modified GMRS system license granted to a non-individual on or after July 31, 1987, would not be grandfathered and would be subject to the new rules after the expiration of the license terms.

67. Comments from the land mobile community generally were of the view that the grandfathering procedures should be as liberal as possible.[56] On the other hand, some personal users objected to the concept of grandfathering entirely.[57] Many personal users opposed grandfathering high-volume dispatch operations.[58] Many personal users also favored limiting any grandfathering provisions to only one or two license terms.[59] Some personal user comments sought assurance that grandfathered entities would be

limited to their current operating privileges.[60] This was especially true with respect to the capability to change or add channels.[61]

68. In proposed Section 95.5(b) we had listed six substantial modifications that we would not allow grandfathered entities. The new rule we are adopting, Section 95.71(e), adds one more: changing or adding assigned frequencies. This is consistent with traditional concepts of substantial modification as well as with our decision to draw a distinction between GMRS systems licensed to individuals and to non-individuals with respect to channel availability.

69. We intend to strictly adhere to the provisions we are adopting with respect to grandfathering.[62] Only GMRS systems licensed to non-individuals before July 31, 1987, will be grandfathered. The rules governing eligibility will be applied prospectively to all other existing GMRS systems upon expiration of their licenses. Any GMRS systems licensed to non-individuals that made the substantial modifications described in Section 95.71(e) of the new rules between July 31, 1987, and December 31, 1988, will be considered newly licensed as of the date of grant of such modification(s) and will not be grandfathered.[63] Their licenses, valid until the expiration of their terms, will become subject to the new rules governing eligibility. Similarly, new GMRS systems licensed to non-individuals on or after July 31, 1987, will not be grandfathered.[64] Their licenses, valid until the expiration of their terms, will not be renewed.

70. In addition, we have decided to permit non-individuals to file applications for new or substantially modified GMRS system licenses through December 31, 1988. Applications for new or substantially modified GMRS system licenses by non-individuals will not be accepted for filing on or after January 1, 1989. All applications for new or modified GMRS system licenses by non-individuals filed on or before December 31, 1988, will be processed. New or substantially modified GMRS system licenses granted to these non-individuals, however, will not be grandfathered. Thus, their licenses, valid until the expiration of their terms, will not be renewed.

71. It is currently our policy to routinely grant an application to reinstate an expired GMRS system license filed within six months of the date of expiration of that license, provided that it is accompanied by a GMRS system renewal application. We intend to continue to follow this policy for both grandfathered and individually licensed GMRS systems. For this reason we are codifying this "grace period" at new Section 95.89(e). Applications for reinstatement of a GMRS system license filed more than six months after the expiration of that license must include an extraordinary showing to be granted.

IV. CONCLUSION

72. In summary, we have decided to reorient the GMRS to accommodate more fully the needs of personal users. We have adopted rules to give additional operating privileges to GMRS systems licensed to individuals, and to cease licensing GMRS systems to non-individuals. We will, however, continue to permit both personal and business communications in the GMRS, and all GMRS systems licensed to non-individuals that existed when we initiated this proceeding are grandfathered. GMRS systems licensed to individuals will be able to take immediate advantage of their increased privileges as of the date these rules become effective.

73. We are adopting the rules proposed with respect to eligibility, transient use and small base stations, with minor modifications, such as making it clear that grandfathered GMRS systems may not change previously assigned frequencies. We decline to adopt the proposed rules to eliminate Commission assignment of frequencies. Instead, we are allowing all GMRS systems licensed to individuals a maximum of two assigned channels or channel pairs. Mobile stations in all GMRS systems will be permitted to transmit on the 462.675 MHz/ 467.675 MHz channel pair for emergency and traveler assistance communications.

74. On the basis of comments responding to our questions in the *Notice* about simplex operation on repeater input channels, we have concluded that we must eventually prohibit this type of operation. We have adopted a lead-in period of five years to give current 467 MHz simplex users adequate time to accommodate their communications needs, and we encourage GMRS systems licensed to individuals to consider the new 462 MHz interstitial frequencies for this purpose.

75. The comments we received about release of interstitial frequencies, coupled together with the action we are taking prohibiting simplex operation on repeater input frequencies, have led us to revise our approach to the question of release of these frequencies. We are adopting rules releasing all of the 462 MHz interstitial frequencies. We are declining to release any of the 467 MHz interstitial frequencies.

76. Although we are grandfathering existing GMRS systems licensed to entities other than individuals, each of the enhanced operating privileges that we are adopting for the purpose of furthering personal use will only apply to GMRS systems licensed to individuals. Grandfathered GMRS systems will, of course, have all previously authorized operating privileges. The new rules have been structured to explicitly accommodate both types of operation.

77. Some commenters, including PRSG, suggested many substantive changes to the GMRS in addition to those proposed in the *Notice*. We do not intend to address each of them here. They are, for the most part, clearly beyond the intended scope of this proceeding. To the extent they have an impact upon the decisions in this proceeding, they have been considered and, where applicable, discussed above. In addition, we have implemented the non-substantive and editorial changes that we proposed.

V. REGULATORY FLEXIBILITY ACT

78. Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub.L. 96-354) we certified that these rules will not have a significant economic impact on a substantial number of small entities. Although these changes allow the personal radio community greater flexibility and convenience, they will not cause a significant economic impact on any small entities.

VI. PAPERWORK REDUCTION ACT

79. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden that the Commission imposes on the public. This proposed reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ORDERING CLAUSES

80. For the reasons stated above, IT IS ORDERED that effective **January 1, 1989,** Subparts A and E of Part 95 of the Commission's Rules, 47 C.F.R. Subparts A and E, ARE AMENDED as set forth in Appendix A below. Authority for this action is found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303.

81. IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

82. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Subparts A and E of Part 95 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 95 – Personal Radio Services

Subpart A – General Mobile Radio Service (GMRS)

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Paragraph (a) of Section 95.1 is revised to read as follows:

§ 95.1 The General Mobile Radio Service (GMRS).

(a) The *GMRS* is a land mobile radio service available to persons for short-distance two-way communications to facilitate the activities of licensees and their immediate family members. Each licensee manages a system consisting of one or more stations.

* * * * *

3. Section 95.3 is revised to read as follows:

§ 95.3 License required.

Before any station transmits on any channel authorized in the GMRS from any *point* (a geographical location) within or over the territorial limits of any area where radio services are regulated by the FCC, the responsible party must obtain a *license* (a written authorization from the FCC for a GMRS system).

4. Section 95.5 is revised to read as follows:

§ 95.5 License eligibility.

An *individual* (one man or one woman) is eligible to obtain, renew and have modified a GMRS system license if that individual is 18 years of age or older and is not a representative of a foreign government. A *non - individual* (an entity other than an individual) is ineligible to obtain a new GMRS system license or to make a major modification to an existing GMRS system license *(see* § 95.71(e)). Certain non-individuals are eligible to renew existing GMRS system licenses *(see* §§ 95.89(c) and (d)).

5. Paragraph (a) of Section 95.7 is revised to read as follows:

§ 95.7 Channel sharing.

(a) Channels or channel pairs are available to GMRS systems only on a shared basis and will not be assigned for the exclusive use of any licensee. All station operators and GMRS system licensees must cooperate in the selection and use of channels to reduce interference and to make the most effective use of the facilities.

* * * * *

6. In Section 95.25, paragraph (d)(2)(ii) is revised, paragraph (e) is redesignated as paragraph (f), and a new paragraph (e) is added to read as follows:

§ 95.25 Land station description.

* * * * *

(d) A *small control station* is any control station that:

(1) * * *

(2) *Is*:

(i) * * *

(ii) North of Line A or east of Line C, and the station transmits with no more than 5 watts *ERP* (effective radiated power).

(e) A *small base station* is any base station that:

(1) Has an antenna no more than 6.1 meters (20 feet) above the ground or above the building or tree on which it is mounted *(see* § 95.51); and

(2) Transmits with no more than 5 watts ERP.

(f) A land station may be licensed to transmit as more than one class. (*Example*: A land station is licensed as both a base station and a control station. When it is transmitting as a base station its communication points are those of a base station *(see* § 95.55). When it is transmitting as a control station its communication points are those of a control station *(see* §95.59).)

7. Section 95.29 is revised to read as follows:

§ 95.29 Channels available.

(a) The licensee of the GMRS system must select the transmitting channel or channel pair for the stations in the GMRS system from the following lists:

(1) For a base station, mobile relay station, fixed station or mobile station, the following 462 *MHz* (megahertz) channels: 462.5500, 462.5750, 462.6000, 462.6250, 462.6500, 462.6750, 462.7000 and 462.7250.

(2) For a mobile station, control station or fixed station operated in the duplex mode, the following 467 MHz channels: 467.5500, 467.5750, 467.6000, 467.6250, 467.6500, 467.6750, 467.7000 and 467.7250.

(3) As of December 31, 1993, the 467 MHz channels may be used only to transmit communications through a mobile relay station and for remotely controlling a mobile relay station. As of December 31, 1993, no station in a GMRS system may transmit communications *directly* (not through a mobile relay station) on the 467 MHz channels.

(b) The FCC will normally assign only one channel or one *channel pair* (one 462 MHz channel and its counterpart 5 MHz spaced 467 MHz channel) to a GMRS system comprised of stations intended for operation in the simplex mode. A second channel or channel pair will be assigned at the request of the applicant.

(c) The FCC will normally assign only one channel pair to a GMRS system comprised of stations intended for operation in the duplex mode. A second channel pair will be assigned at the request of the applicant.

(d) No GMRS system may be assigned more than two channels or channel pairs. Stations in certain GMRS systems may, however, also transmit on additional frequencies listed in the following paragraphs, in accord with the conditions specified.

(e) Mobile stations in a GMRS system licensed to an individual that is not specifically authorized for the 462.675 MHz/467.675 MHz channel pair may transmit on that channel pair with the following limitations:

(1) The communications must be for the purpose of soliciting or rendering assistance to a traveler, or for communicating in an emergency pertaining to the immediate safety of life or the immediate protection of property; and

(2) The frequency 467.675 MHz may be used only for the purpose of accessing and communicating through a mobile relay station transmitting on 462.675 MHz.

(f) Except for a GMRS system licensed to a non-individual, a mobile station or a small base station operating in the simplex mode may transmit on the following 462 MHz interstitial channels: 462.5625, 462.5875, 462.6125, 462.6375, 462.6625, 462.6875 and 462.7125. These channels may be used only under the following conditions:

(1) Only voice type emissions may be transmitted;

(2) The station does not transmit one-way pages; and

(3) The station transmits with no more than 5 watts ERP.

(g) Fixed stations in GMRS systems authorized before March 18, 1968, located 160 kilometers (100 miles) or more from the geographic center of urbanized areas of 200,000 or more population as defined in the U.S. Census of Population, 1960, Vol. 1, Table 23, page 50 that were authorized to transmit on channels other than those listed in this section may continue to transmit on their originally assigned channels provided that they cause no interference to the operation of stations in any of the Part 90 private land mobile radio services.

8. Section 95.39 is revised to read as follows:

§ 95.39 Considerations near FCC monitoring facilities.

The FCC may impose additional restrictions on a land station in a GMRS system if it is at a point within 4.8 kilometers (3 miles) of an FCC monitoring facility and the station's transmissions degrade, obstruct, or repeatedly interrupt the operation of the equipment at the FCC monitoring facility. Before applying for a license to put a land station at such a point, or before applying to change anything in a station already licensed for such a point, you should consult the FCC by writing to the Chief, Field Operations Bureau, Federal Communications Commission, Washington, D.C. 20554.

9. Paragraph (f) of Section 95.51 is revised to read as follows:

§ 95.51 Antenna height.

* * * * *

(f) The antenna for a small base station or for a small control station must not be more than 6.1 meters (20 feet) above the ground or above the building or tree on which it is mounted.

10. In Section 95.53, introductory paragraph (a), introductory paragraph (c), paragraph (d), introductory paragraph (f) and paragraph (f)(1) are revised, and a new paragraph (g) is added to read as follows:

§ 95.53 Mobile station communication points.

(a) A mobile station unit may transmit communications directly to:

* * * * *

(c) A mobile station unit authorized to transmit on a channel assigned to a mobile relay station in another GMRS system may transmit communications through that mobile relay station to:

* * * * *

(d) A mobile station unit in a GMRS system licensed to an individual authorized to transmit on a channel assigned to a mobile relay station in another GMRS system may transmit communications through that mobile relay station with the permission of the licensee of the other GMRS system to:

(1) Other mobile station units in the same GMRS system; and

(2) Mobile station units in another GMRS system having permission to transmit communications through the mobile relay station.

* * * * *

(f) A mobile station unit must not transmit communications through a mobile relay station in another GMRS system, for retransmission to:

(1) Other mobile station units in its own GMRS system, unless:

(i) The mobile station units are in a GMRS system licensed to an individual; and

(ii) The licensee of the other GMRS system has given permission to use the mobile relay station for this purpose.

* * * * *

(g) A mobile station unit may transmit communications as a radio control link *(see* § 95.127) to a remotely controlled station.

11. Section 95.57 is amended by revising introductory paragraph (b) and paragraph (b)(1) to read as follows:

§ 95.57 Mobile relay station communication points.

* * * * *

(b) A mobile relay station in a GMRS system must not automatically retransmit communications between:

(1) A mobile station unit in any other GMRS system *and* another unit of the same mobile station, unless:

(i) The other GMRS system is licensed to an individual; and

(ii) The licensee of the GMRS system with the mobile relay station has given permission to use the mobile relay station for this purpose;

* * * * *

12. Paragraph (a) of Section 95.71 is revised, and new paragraphs (e) and (f) are added to read as follows:

§ 95.71 Applying for a new or modified license.

(a) An individual applies for a license for a new GMRS system by filling out an application form and attaching all additional information required. An individual applies to modify a license for an existing GMRS system using the same form and in the same manner as applying for a new GMRS system. Individuals should submit their applications, together with the filing fee, to the Federal Communications Commission, General Mobile Service, P.O. Box 360373M, Pittsburgh, PA 15251-6373.

* * * * *

(e) A non-individual may not obtain a new GMRS system license. A non-individual that held a GMRS system license issued before July 31, 1987, may not make the following major modifications:

(1) Change the area of operation of the GMRS system;

(2) Add any stations to the GMRS system;

(3) Increase the number of units of the mobile station;

(4) Change the location of any land station in the GMRS system;

(5) Add one or more channels or channel pairs and/or change the assigned channel(s) or channel pair(s);

(6) Increase the transmitter power of an station in the GMRS system; or

(7) Increase the height of a station antenna in the GMRS system.

(f) A GMRS system licensee may notify the FCC of a change of name or a change of mailing address by sending a letter to the Federal Communications Commission, Gettysburg, PA 17326. This does not, however, permit GMRS system license transferability *(see* § 95.109). Nor does this suffice for corporate transfer of control -- the provisions of § 95.111 apply instead.

13. Paragraph (c) of Section 95.73 is revised to read as follows:

§ 95.73 System licensing.

* * * * *

(c) One form must be used to apply for the following stations in a GMRS system:

(1) The mobile station;

(2) All small base stations *(see* § 95.25(e));

(3) All small control stations *(see* § 95.25(d)); and

(4) All other land stations (at no more than 6 locations).

* * * * *

14. Paragraphs (g), introductory paragraph (h), introductory paragraph (i), (j) and (n) of Section 95.75 are revised to read as follows:

§ 95.75 Basic information.

* * * * *

(g) Transmitter power as follows:

(1) Transmitter output power in watts for all stations.

(2) Station ERP in watts for all stations other than mobile stations, small base stations and small control stations.

(h) Each land station point (except small base stations and small control stations);

* * * * *

(i) Each control point for each remotely controlled land station *(see* § 95.127), including small base stations and small control stations;

* * * * *

(j) Antenna height *(see* § 95.51) and antenna ground elevation for each land station, except for small base stations and small control stations;

* * * * *

(n) Emission designator. In the GMRS, emission F3E will be considered to include use of a *selective calling tone, or a tone or digitally operated squelch* (a tone code used to address a particular station) in conjunction with voice communications;

* * * * *

15. Section 95.77 is amended by revising paragraph (a) and reserving paragraph (b) to read as follows:

§ 95.77 Additional information for GMRS systems with land stations at four or more locations.

(a) An application for a new or modified GMRS system having land stations (except for small control stations or small base stations) at 4 or more locations must include a *functional system diagram* (a drawing showing details of the GMRS system, including the points between which communications with other stations in the system will be exchanged.)

(b) [Reserved.]

* * * * *

16. Paragraph (b) of Section 95.83 is revised to read as follows:

§ 95.83 Additional information for stations with antennas higher than normally allowed.

* * * * *

(b) Each base station and each control station with an antenna height greater than 6.1 meters (20 feet) must be separately identified on Form 574 *(see* §§ 95.25(d) and (e) and 95.51(f)).

17. Section 95.89 is revised to read as follows:

§ 95.89 Renewing a license.

(a) The licensee of a GMRS system may apply to the FCC to renew the license for another term *(see* § 95.105) by filling out FCC Form 574-R (or FCC Form 405-A when the licensee has not gotten FCC Form 574-R within 30 days of the expiration of the license) and sending it to: Federal Communications Commission, 574R Land Mobile Renewal, P.O. Box 360559M, Pittsburgh, PA 15251-6559

(unless the licensee is a governmental entity, in which case the renewal application should be sent to Federal Communications Commission, Gettysburg, PA 17326).

(b) If the renewal application is sent to the FCC before the existing license term expires, the renewal application is timely filed. Except for GMRS systems whose licenses may not be renewed *(see* §§ 95.89(c)(3) and 95.89(d)), stations in a GMRS system whose application is timely filed may continue to transmit under the expired license until the FCC acts on the renewal application. A copy of the renewal application sent to the FCC must be kept in the GMRS system records *(see* § 95.113) until the renewed license, or notification of other FCC action, is received.

(c) A GMRS system licensed to a non-individual before July 31, 1987, is eligible to renew that license and all subsequent licenses based upon it if:

(1) The non-individual is:

(i) A partnership, and each partner is 18 years of age or older;

(ii) A corporation;

(iii) An association;

(iv) A state, territorial or local government unit; or

(v) Other legal entity;

(2) The non-individual is not:

(i) A foreign government;

(ii) A representative of a foreign government; or

(iii) A federal government agency; and

(3) The licensee has not been granted any of the modifications to its GMRS system license specified in § 95.71(e).

(d) A GMRS system licensed to a non-individual on or after July 31, 1987, may not be renewed.

(e) If a GMRS system license is allowed to expire, the former licensee may file an application to reinstate the expired license within six months after the expiration date. The application to reinstate must be accompanied by a renewal application. An expired GMRS system license for which a timely renewal application has not been filed is not valid. No station of such a GMRS system may transmit until the licensee has received a new GMRS system license based on the late-filed renewal application.

18. Paragraph (c)(2) of Section 95.103 is revised to read as follows:

§ 95.103 Licensee duties.

* * * * *

(c) * * *

(2) If the status of a non-individual GMRS system licensee changes (for example, when a corporation is dissolved and a new corporation stands in its place, or a partnership becomes a corporation), the licensee must send the license to the FCC for cancellation *(see* § 95.117(b)).

* * * * *

19. Paragraph (b)(2) of Section 95.113 is removed and reserved.

20. In Section 95.117, the zip code in the introductory language of paragraph (b) is corrected to read 17326, paragraph (b)(2) is removed and reserved, and paragraph (c) is removed and reserved.

21. Section 95.121 is revised to read as follows:

§ 95.121 Transmitting channel.

Each station in a GMRS system must transmit only on the channel(s) or channel pair(s) *(see* §§ 95.7 and 95.29) printed on the license for that station, or authorized by these Rules for use by that station *(see* § 95.29(e) and (f)).

22. Paragraph (b)(3) of Section 97.129 is removed and reserved. Also, paragraph (d) of Section 95.129 is revised to read as follows:

§ 95.129 Station equipment.

* * * * *

(d) Every small base station and every small control station must use an antenna no more than 6.1 meters (20 feet) high *(see* § 95.25(d) and (e)).

23. Paragraph (a) and the heading of Section 95.131 are revised to read as follows:

§ 95.131 Servicing station transmitters.

(a) The GMRS system licensee shall be responsible for the proper operation of all stations in the GMRS system at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation.

* * * * *

24. Paragraph (b)(2) of Section 95.133 is revised to read as follows:

§ 95.133 Modification to station transmitters.

* * * * *

(b) * * *

(2) In accordance with the original manufacturer's nstructions.

25. In Section 95.135, the heading and paragraph (c) are revised, and a new paragraph (e) is added to read as follows:

§ 95.135 Maximum authorized transmitting power.

* * * * *

(c) A small control station at a point north of Line A or east of Line C must transmit with no more than 5 watts ERP.

* * * * *

(e) A small base station must transmit with no more than 5 watts ERP.

26. Section 95.137 is revised to read as follows:

§ 95.137 Moving a small base station or a small control station.

(a) A small base station *(see* § 95.25(e)) or a small control station *(see* § 95.25(d)) in a GMRS system may be moved from the point specified on the license to any other point where radio services are regulated by the FCC.

(b) The licensee must file an application to modify the GMRS system *(see* § 95.71) to show the new point within 30 days after the small base station or the small control station is moved.

27. Section 95.139 is revised to read as follows:

§ 95.139 Adding a small base station or a small control station.

(a) Except for a GMRS system licensed to a non-individual, one or more small base stations or small control stations may be added to a GMRS system at any point where radio services are regulated by the FCC.

(b) The licensee must file an application to modify the GMRS system (see § 95.71) within 30 days after each small base station or small control station is added.

(c) Non-individual licensees may not add any small base stations or small control stations to their GMRS systems.

28. Section 95.141 is revised to read as follows:

§ 95.141 Interconnection prohibited.

No station in a GMRS system may be interconnected to the public switched telephone network, except as and in accordance with the requirements and restrictions applied to a wireline control link *(see* § 95.127).

29. The heading and introductory language of Section 95.175 are revised to read as follows:

§ 95.175 Cooperation in sharing channels.

The station operator must cooperate in *sharing* each channel with station operators of other stations by:

* * * * *

30. Paragraphs (b), (d), (e) and (f) of Section 95.179 are revised to read as follows:

§ 95.179 Individuals who may be station operators.

* * * * *

(b) In a GMRS system licensed to a non-individual, eligible station operators are limited to the persons listed in subparagraph (1) with the conditions listed in subparagraph (2), as follows:

(1) Only the following persons may be permitted to operate under the authority of a GMRS system licensed to a non-individual:

If the GMRS system licensee is:	These persons may be station operators:
(i) A partnership	Licensee's partners and employees;
(ii) A corporation	Licensee's officers, directors, members and employees;
(iii) An association	Licensee's members and employees;
(iv) A governmental unit	Licensee's employees.

(2) These persons may only communicate messages about the licensee's business activities. Employees of the licensee may communicate messages while acting within the scope of their employment, and only about the licensee's business activities.

* * * * *

(d) The station operator of a GMRS system licensed to an individual may be a station operator in any other GMRS system if he/she has permission from the licensee of the other GMRS system.

(e) The provisions of § 95.33 regarding cooperative use do not apply to or govern the authority of a GMRS licensee to designate station operators in accordance with the provisions of this section.

(f) Except for emergency communications *(see* § 95.143), only persons specified in paragraphs (a) through (d) may be GMRS station operators.

Subpart E -- Technical Regulations

31. Section 95.621 is revised to read as follows:

§ 95.621 GMRS transmitter channel frequencies.

(a) The GMRS transmitter *channel frequencies* (reference frequencies from which the carrier frequency, suppressed or otherwise, may not deviate by more than the specified frequency tolerance) are 462.5500, 462.5625, 462.5750, 462.5875, 462.6000, 462.6125, 462.6250, 462.6375, 462.6500, 462.6625, 462.6750, 462.6875, 462.7000, 462.7125, 462.7250, 467.5500, 467.5750, 467.6000, 467.6250, 467.6500, 467.6750, 467.7000 and 467.7250.

Note: Certain GMRS transmitter channel frequencies are authorized only for certain station classes and station locations. *See* Part 95, Subpart A.

(b) Each GMRS transmitter for mobile station, small base station and control station operation must be maintained within a frequency tolerance of 0.0005%. Each GMRS transmitter for base station (except small base), mobile relay station or fixed station operation must be maintained within a frequency tolerance of 0.00025%.

32. Section 95.651 is revised to read as follows:

§ 95.651 Frequency capability.

(a) No transmitter will be type accepted for use in the CB service if it is equipped with a frequency capability not listed in § 95.625, and no transmitter will be type accepted for use in the GMRS if it is equipped with a frequency capability not listed in § 95.621, unless such transmitter is also type accepted for use in another radio service for which the frequency is authorized and for which type acceptance is also required. (Transmitters with frequency capability for the Amateur Radio Services, Military Affiliate Radio System and Civil Air Patrol will not be type accepted.)

(b) All frequency determining circuitry (including crystals) and programming controls in each CB transmitter and in each GMRS transmitter must be internal to the transmitter and must not be accessible from the exterior of the transmitter operating panel or from the exterior of the transmitter enclosure.

(c) No add-on device, whether internal or external, the function of which is to extend the transmitting frequency capability of a CB transmitter beyond its original capability, shall be manufactured, sold or attached to any CB station transmitter.

33. Section 95.661 is removed and reserved.

APPENDIX B

List of Comments Filed

Helen E. Acuff
Antelope Valley REACT Team C-40
Douglas A. Barker
William S. Cantwell
Jess L. Collier
Communications Center
Crystal Busters Citizens Band Club, Inc.
Timothy A. Culek
Dow Chemical Telecommunications Corporation
Edward M. Downey
Electronic Industries Association, Land Mobile Radio Section
Electronic Industries Association, Personal Communications Section
EMA Enterprises
Patrick J. Glancy
I. W. Radio Club
Kansas Council of REACT Teams
Daniel B. Kimball
Gayland Kitch
David R. Long
J. Edward Marsden
Miami Valley REACT
National Association of Business and Educational Radio, Inc.
National Capital REACT, Inc.
John Nixon
Suzanne Nixon
Northern Utah Citizens Communication Association
Orange County REACT
Palomar Communications, Inc.
William Pattee
Pennsylvania Emergency Communications Council, Inc.
Personal Radio Steering Group, Inc.
Eric Piee
Pinellas Public Radio
John S. Powell
REACT International, Inc.
Michael G. Redman
Repeater Users Group
Rocky Mountain Patrol, Inc.
William F. Ruck
Richard L. Ryan
San Angelo REACT Association
Carl J. Schlueter
Michael R. Schweizer
Roger D. Snyder
Southwestern REACT of San Diego County, Inc.
Special Industrial Radio Service Association, Inc.
Suburban REACT Team
3410 of Upper Darby, Pennsylvania
Kenneth Tangen
James D. Teague

John C. Thomas
Richard H. Westray
Mark D. Withers

APPENDIX C

List of Reply Comments Filed

Douglas A. Barker
Capital City Communications, Inc.
Tim Culek
Electronic Industries Association, Personal Communications Section
David R. Long
Personal Radio Steering Group, Inc.
David S. Powell
John S. Powell
Edward W. N. Smith
Special Industrial Radio Service Association, Inc.
Suburban REACT Team #3410 of Upper Darby, Pennsylvania
Robert C. Wallenburg
Michael J. Wooden
Risa Yager

FOOTNOTES

[1] *Notice of Proposed Rule Making*, 2 FCC Rcd 4490 (1987).

[2] We use the term "individual" throughout this discussion to refer to a human being -- that is, one man or woman. (Children under the age of eighteen are not eligible in the GMRS, and would continue to be ineligible for a GMRS system license under the rules we are adopting in this document. They can, however, be station operators in a GMRS system.

[3] For a complete list of commenters, see Appendix B.

[4] For a complete list of those who filed reply comments, see Appendix C.

[5] The Part 90 Private Land Mobile Radio Services include the Public Safety Radio Services, the Special Emergency Radio Service, the Industrial Radio Services, the Land Transportation Radio Services, the Radiolocation Service, as well as regulations governing licensing and use of frequencies in the 806-821, 851-866, 896-901 and 935-940 MHz frequency bands. *See* 47 C.F.R. Part 90.

[6] *See* Comments of the Personal Radio Steering Group, Inc. at 8-9.

[7] Report and Order, General Docket No. 83-26, 57 RR2d 559 (1985).

[8] Report and Order, PR Docket No. 86-38, 2 FCC Rcd 2383 (1987).

[9] In PR Docket No. 86-404, however, we have expanded the eligibility of SMR end users to include individuals and federal government agencies in an effort to increase their communications options. Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988).

[10] There were 36,424 licenses in the GMRS as of May 31, 1988.

[11] Comments of PRSG at 8.

[12] Comments of Carl J. Schlueter at 1.

[13] Comments of NABER at 6. *See* Notice of Inquiry, PR Docket No. 86-38, 51 Fed. Reg. 5212 (1986); *see also* Report and Order, PR Docket No. 86-38, 2 FCC Rcd 2383 (1987).

[14] Comments of NABER at 8.

[15] Comments of EIA-Land Mobile at 3.

[16] Comments of EIA-Land Mobile at 3.

[17] *See* Comments of REACT International at 1.

[18] Comments of the Personal Communications Section, Mobile Communications Division, Information and Telecommunications Technologies Group, of the Electronic Industries Association at 1-2.

[19] Comments of PRSG at 10.

[20] *See* Section 97.110 of the Commission's Rules, 47 C.F.R. § 97.110.

[21] *See* Section 97.3(a) and (b) of the Commission's Rules, 47 C.F.R. § 97.3(a) and (b).

[22] *See* Reply Comments of PRSG at 25.

[23] *See* Reply Comments of Edward W. N. Smith at 2-3.

[24] *See* Reply Comments of Risa Yager, a former Internal Revenue Service Tax Auditor, at 1-6.

[25] *See* Reply Comments of PRSG at 36.

[26] *See* Reply Comments of PRSG at 36, footnote 35.

[27] Comments of EIA-Personal at 2.

[28] Comments of PRSG at 31.

[29] Comments of NABER at 9.

[30] Comments of PRSG at 33.

[31] *See* Comments of National Capital REACT at 3-4.

[32] *See* Comments of PRSG at 33.

[33] Reply Comments of PRSG at 61.

[34] Comments of EIA-Personal at 2.

[35] Comments of EIA-Land Mobile at 4.

[36] Reply Comments of PRSG at 69.

[37] Comments of PRSG at 36.

[38] Comments of PRSG at 39.

[39] *See* Comments of PRSG at 37.

[40] These additional steps are based upon similar rules that apply to type acceptance of equipment for use in the Citizens Band Radio Service. *See* 47 C.F.R. § 95.661(a) and (b).

[41] Report and Order, PR Docket No. 86-37, 2 FCC Rcd 7221 (1987).

[42] 47 C.F.R. § 95.641(a).

[43] A GMRS base station is a land station that may transmit communications directly to mobile station units in any GMRS system or to paging receivers in the same GMRS system. A GMRS control station is a land station that may transmit communications (1) as a radio control link to a remotely controlled station, or (2) through a mobile relay station to mobile station units in any GMRS system.

[44] A small control station is a control station that has an antenna no more than 6.1 meters (20 feet) above the ground or above the building or tree on which it is mounted and is either (1) south of Line A or west of Line C or (2) north of Line A or east of Line C and transmitting with no more than five watts effective radiated power. (Lines A and C are defined at 47 C.F.R. § 1.955(e).)

[45] Comments of PRSG at 23.

[46] Comments of PRSG at 18.

[47] Unlike the repeater input frequencies where mobile station transmissions can interfere with other mobile station transmissions attempting to access a repeater, on repeater output frequencies

mobile station transmissions are unlikely to impede transmissions by the repeater itself. Also, repeater transmissions are likely to be heard by mobile stations monitoring repeater output frequencies before they transmit. Therefore, we perceive no similar problem on the 462 MHz channels.

[48] Comments of PRSG at 20.

[49] Comments of EIA-Personal at 3-4.

[50] Comments of EIA-Land Mobile at Appendix.

[51] Reply Comments of PRSG at 73-75.

[52] *See* Reply Comments of PRSG at 71-72. PRSG did, however, recommend that one of the three interstitial channels be located on a different frequency. *Id.*

[53] *See, e.g.*, Comments of REACT International, Inc., Palomar Communications, Inc., I.W. Radio Club, Northern Utah Citizens Communication Association, San Angelo REACT Association, Pinellas Public Radio, Suburban REACT Team 3410 of Upper Darby, Pennsylvania, and Rocky Mountain Patrol, Inc.

[54] *See* Comments of Repeater Users Group of Riverside, California, Antelope Valley REACT Team C-40, Southwestern REACT of San Diego County, Inc., Communications Center of Anaheim, California, and Orange County REACT.

[55] Public Notice, Interim Policies for GMRS, No. 4872, September 17, 1987.

[56] *See, e.g.*, Comments of SIRSA at 6-8 and Dow Chemical Telecommunications Corp.at 4-9.

[57] *See* Comments of Crystal Busters CB Club at 1, John Nixon at 2 and Suzanne Nixon at 2.

[58] *See* Comments of REACT International at 1, Repeater Users Group at 2, Jess L. Collier at 2 and William F. Ruck at 2-3.

[59] *See* Comments of Douglas A. Barker at 2, Southwestern REACT of San Diego County, Inc. at 2-3, San Angelo REACT Association at 1, Communications Center at 2, Orange County REACT at 2, David R. Long at 2-3, EMA Enterprises at 2, J. Edward Marsden at 2, Kenneth Tangen at 1, John C. Thomas at 1, Richard H. Westray at 2-3, Mark D. Withers at 2, and Reply Comments of Capital City Communications, Inc. at 4.

[60] *See, e.g.*, Comments of PRSG at S1-5, REACT International at 2, Southwestern REACT of San Diego County, Inc. at 3 and Richard H. Westray at 3.

[61] *See, e.g.*, Comments of PRSG at S1-5, REACT International at 2, Northern Utah Citizens Communication Association at 3, Rocky Mountain Patrol, Inc. at 2, Southwestern REACT of San Diego County, Inc., at 3, Jess L. Collier at 2 and Richard H. Westray at 3.

[62] Nonetheless, in cases of extreme hardship we will entertain applications for waiver pursuant to Section 1.3 of our Rules, 47 C.F.R. § 1.3.

[63] As of July 18, 1988, there were 115 entities in this category. There is one exception to the July 31, 1987, deadline for modifications that result in loss of grandfathered status. A grandfathered system that filed an application to add or change assigned frequencies that was granted before the date of adoption of this *Report and Order* will not lose grandfathered status. Any grandfathered systems whose applications to add or change frequencies are still pending as of that date will be afforded the opportunity to withdraw their applications so that they may retain grandfathered status.

[64] As of July 18, 1988, there were 575 entities in this category.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-93

In the Matter of

Investigation of
Equal Access Rate Elements
Filed Pursuant to Waivers of Part 69

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: October 19, 1988; Released: November 10, 1988

By the Commission:

I. BACKGROUND

1. On November 25, 1987, this Commission released an Order[1] directing the Bell Atlantic Operating Companies (Bell Atlantic) and Southwestern Bell Telephone Company (Southwestern) to refund to their interexchange carrier (IC) customers revenues collected through Equal Access Recovery Charge (EARC) rate elements during the April 1985 through September 1985 time period.[2]

2. On December 28, 1987, Bell Atlantic filed a petition for reconsideration (Petition) [3] and a request for stay of this Commission's *Refund Order*.[4] The Common Carrier Bureau denied Bell Atlantic's request for stay on January 13, 1988.[5] On January 6, 1988, MCI filed an opposition to Bell Atlantic's petition for reconsideration (MCI Opposition). AT&T filed an opposition to Bell Atlantic's petition on January 13, 1988 (AT&T Opposition). On January 20, 1988, Bell Atlantic filed a reply to both oppositions (Reply).

II. SUMMARY OF PLEADINGS

3. Bell Atlantic contends generally that this Commission improperly found that Bell Atlantic obtained excess earnings from its equal access rate elements. Petition at 1. Bell Atlantic submits that although this Commission purported to measure equal access earnings, it actually examined costs and revenues unrelated to equal access. *Id.* at 2.[6] Bell Atlantic further contends that this Commission incorrectly determined that since equal access costs were not adequately defined or reasonably available, it was necessary to investigate all costs. *Id.* at 3-4. Bell Atlantic argues that this Commission failed to recognize that only local switching costs have any bearing on equal access. *Id.* at 5-9. In addition, Bell Atlantic contends, this Commission applied unreasonable rate of return procedures in its evaluation of equal access earnings. *Id.* at 9. Finally, Bell Atlantic maintains that this Commission unlawfully calculated refunds based on prescribed rates, *i.e.*, the 1984 switched access rates. *Id.* at 13-17.

4. In opposition, MCI contends that since Bell Atlantic's petition repeats arguments considered and decided by this Commission, Bell Atlantic has failed to carry its burden under Section 1.429 of this Commission's Rules, 47 C.F.R. § 1.429. MCI Opposition at 3.[7] MCI further maintains that contrary to Bell Atlantic's contention, the relevant rates at issue in this proceeding, the equal access rate elements of the switched access rates, were not prescribed by this Commission. Moreover, MCI asserts, even if the relevant rates are the traffic sensitive elements of the switched access rates, the carriers involved in this proceeding were warned by this Commission when the rates were approved that refunds were contemplated. *Id.* at 9-10.

5. In its opposition, AT&T argues that Bell Atlantic's petition should be denied, largely because it "reiterates arguments previously considered and correctly rejected by the Commission." AT&T Opposition at 1. AT&T further contends that Bell Atlantic's only new argument -- that the *Refund Order* constitutes a refund of prescribed rates -- could have been made in Bell Atlantic's direct case, and should now be rejected as untimely. *Id.* at 5. Moreover, AT&T asserts, the argument lacks merit because the equal access rate elements were not prescribed, but were permitted to go into effect subject to investigation and an accounting Order. *Id.*[8]

6. Bell Atlantic replies that the errors it has identified would constitute reversible error on appeal. Reply at 2. In addition, Bell Atlantic reiterates its contention that this Commission based its refund calculation on general switched access rates that had been prescribed. *Id.* at 3.

III. DISCUSSION

7. Having reviewed Bell Atlantic's petition and the responsive pleadings, we conclude that Bell Atlantic has failed to justify its request for reconsideration. As both MCI and AT&T correctly note, Bell Atlantic's petition is largely repetitive of its direct case. Petitions for reconsideration are not granted for the purpose of altering our findings on the basis of matters that have already been fully considered and substantively settled. *See* Section 1.106(c) of the Commission's Rules, 47 C.F.R. § 1.106(c).[9]

8. Further, the only new argument Bell Atlantic raises in its petition for reconsideration, that this Commission based its refund calculation on 1984 switched access rates that had been prescribed, could have been raised in Bell Atlantic's direct case.[10] Reconsideration is only appropriate if arguments and facts could not have been known at the time of the last opportunity for submission. 47 C.F.R. § 1.106(c).

IV. CONCLUSION; ORDERING CLAUSE

9. Based upon the foregoing discussion, we conclude that the Bell Atlantic Operating Companies have failed to demonstrate that our *Refund Order* was based on flawed reasoning, or an incomplete review of the record.

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by the Bell Atlantic Operating Companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order, 2 FCC Rcd 7029 (1987) (*Refund Order*).

[2] We concluded that both Bell Atlantic and Southwestern had earned in excess of the authorized rate of return for switched traffic sensitive access elements as a result of the charges collected through their equal access rate elements. *Id.* at 7029. Based on the data provided in Bell Atlantic's direct case, we directed Bell Atlantic to refund approximately 6.2 million. *Id.* at 7034.

[3] The Bell Atlantic petition for reconsideration does not request reconsideration of the amount of the refund. However, in a letter to this Commission dated January 27, 1988, Bell Atlantic claims that the 6.2 million figure in its direct case exceeds its actual earnings on the EARC rate element. According to Bell Atlantic, the revenues collected through the EARC rate element were approximately 4.3 million. Bell Atlantic did not seek confirmation or approval by this Commission regarding its theory of the scope of its refund liability. On June 22, 1988, the Common Carrier Bureau released an Order directing Bell Atlantic to show cause why it should not be required to refund to customers the full amount specified in the *Refund Order*. Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Order to Show Cause, 3 FCC Rcd 3947 (1988). Bell Atlantic responded on July 6, 1988, asserting that during the relevant period, it collected only 5.3 million from the EARC rate element, and has already refunded that amount. The matter is currently under consideration.

[4] On January 4, 1988, American Telephone and Telegraph Company (AT&T) filed an opposition to Bell Atlantic's request for stay; MCI Communications Corporation (MCI) filed an opposition on January 5, 1988.

[5] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order, DA 88-14, released Jan. 13, 1988.

[6] According to Bell Atlantic, this Commission computed the refunds based on the combined revenue, cost, and rate of return data for Local Switching, Line Termination, Intercept, Local Transport, and Equal Access, even though Bell Atlantic recovered equal access costs only from the Local Switching and Equal Access rate elements. Moreover, Bell Atlantic contends, combined Local Switching and Equal Access categories produced an earnings shortfall of 9 million for the overall Bell Atlantic companies during the six months in question. Petition at 2.

[7] We note, however, that Section 1.429 only applies to petitions for reconsideration in Rule Making proceedings.

[8] Further, AT&T asserts, if the refund were of overearnings in Bell Atlantic's traffic sensitive elements (as Bell Atlantic claims) instead of being limited to equal access revenues, the amount of the refund would have been substantially larger. AT&T Opposition at 5 n.***.

[9] *See also* WWIZ, Inc., 37 FCC 685, 686 (1964) (*WWIZ*) (citing Section 1.106), *aff'd sub nom*, Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). While Section 1.106 has been modified slightly since this Commission's decision in *WWIZ*, the discussion therein is appropriate because the intent of that section has not changed.

[10] Moreover, this Commission referred to the revenues produced by the 1984 switched access rate elements only to assess whether equal access revenues were necessary to permit the carriers to recover earnings shortfalls. *See* Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Order Designating Issues for Investigation, 1 FCC Rcd 158 (1986). We did not require refunds of any revenues earned through the switched access rate elements. *Refund Order* at 7033.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BELL ATLANTIC TELEPHONE COMPANIES — AAD-8-1929

Petition for Declaratory Ruling or Clarification Regarding Joint Cost Attestation Audits

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1988; Released: November 10, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. The Bell Atlantic telephone companies[1] (Bell Atlantic) on August 15, 1988, filed a Petition for Declaratory Ruling or Clarification (the petition) regarding their obligations for attestation audits which the Commission required in Docket No. 86-111[2] concerning nonregulated activities. [3] Specifically, Bell Atlantic requests a ruling that the seven Bell Atlantic telephone companies may submit only three separate attestation audits to comply with the *Joint Cost Order* –one for the four C&P Companies, one for Bell of Pennsylvania and Diamond State, and one for New Jersey Bell. Further, Bell Atlantic states that only one audit should be required once it adopts centralized financial data processing systems with the same cost systems, methods, and controls for all operating companies.

2. In establishing rules for the separation of costs of regulated telephone service from costs of nonregulated activities in Docket No. 86-111, the Commission concluded that a requirement for independent audits would be an important part of its commitment to monitor compliance with procedures for the separation of costs provided in that docket. The Commission required that each operating company have an independent audit performed and that a positive opinion audit report be submitted each year. The report is to indicate whether the methodologies put in place by the carrier conform with its approved cost allocation manual and whether the cost allocation results reported to the Commission in the carrier's Report of Annual Revenue Requirement and Joint Cost Data[4] (Revenue Requirement Report) are an accurate application of those methodologies. After reviewing the requirements for audits in the *Joint Cost Order* and the *Reconsideration Order*, and considering the assertions made by Bell Atlantic and by Price Waterhouse in, respectively, the petition and the attachment thereto, we grant the Bell Atlantic petition and require three attestation audits for the seven Bell Atlantic companies.

II. THE PETITION

3. Bell Atlantic notes in the petition that the financial data processing systems, methods, and controls used by the seven Bell Atlantic telephone companies are very similar. Moreover, the four C&P companies all use common systems at a centralized location; Bell of Pennsylvania and Diamond State jointly share systems at another location, separate but similar to those used by the C&P companies; and New Jersey Bell uses separate but similar systems at a third location. Because of the system arrangements that exist, Bell Atlantic claims that there is no need to audit each of the C&P companies separately and to audit Bell of Pennsylvania and Diamond State separately. They assert that separate audits of each of the seven companies would be needlessly expensive and would produce no additional useful information.

4. The petitioner states that the independent auditors have concluded that, given the organizational and operating structure of Bell Atlantic and its three separate centralized systems, three audit reports would represent the most effective and efficient approach to the audit requirements. This statement is substantiated by a letter, submitted as an attachment to the petition, from Price Waterhouse, the independent accountants performing the Commission-required audits for Bell Atlantic. In the letter, Price Waterhouse asserts that "by testing the three separate centralized systems and the related data they process, a satisfactory level of assurance can be provided in order to form conclusions about the adequacy in each of the areas (i.e., time reporting procedures, affiliated transactions, special studies, incidental activities and cost apportionment procedures) to be audited."

5. Further, Bell Atlantic plans eventually to integrate its financial accounting systems regionwide by adopting centralized systems which will process financial data for all seven operating companies. When this integration is completed, Bell Atlantic claims, there will be no justification for requiring more than one audit.

III. DISCUSSION

6. In compliance with the Docket 86-111 requirement for submitting cost allocation manuals to the Commission, Bell Atlantic filed a single cost allocation manual for all of the Bell Atlantic companies.[5] We found this method of submitting a single manual to be acceptable for Bell Atlantic as well as for other affiliated Bell Operating Companies submitting single manuals for the members of such groups. The similarity of accounting systems, including the underlying accounting methods and procedures, among the members of such affiliated groups made single cost manual filings possible for the carriers and acceptable to the Commission.

7. Bell Atlantic asserts in the petition that, in addition to the identical allocation procedures, the seven Bell Atlantic operating companies virtually act as three companies for the purposes of accounting for their daily operations. The financial data processing system for the four C&P companies, including the program modules for separating costs of regulated telephone service from the costs of nonregulated activities, is identical– that is, the same staff processes the accounting data for all four companies, utilizing the same hardware and the same software at a single centralized location. This condition exists for Bell of Pennsylvania and Diamond State as well.

8. The Commission's willingness to rely on independent auditors in satisfying their expectations for costing implementation and cost data reporting assurances is explicit in Docket 86-111.[6] Accordingly, in making our decision in this matter, we have relied in part on the assertion by Price Waterhouse that "by testing the three centralized systems [the C&P system, the Bell of Pennsylvania/Diamond State system, and the New Jersey Bell system] for processing financial data and the related data they process, a satisfactory level of assurance can be provided . . . ." This assessment reflects the professional judgment of Price Waterhouse based on their understanding of the subject systems and of their responsibilities to the Commission, and their statement is consistent with their role as independent auditors in this matter.

9. Considering that there is joint use of three financial data processing systems by Bell Atlantic companies in the manner described in the petition, that our audit requirements can be satisfied by testing the three separate centralized systems, and that seven separate audits would result in significant additional expense for no expected appreciable difference in audit assurances, we allow Bell Atlantic to proceed with the performance of three audits. We require, however, that as the anticipated regionwide centralization of the financial data processing systems for all seven companies is completed, Bell Atlantic shall notify the Chief of the Accounting and Audits Division. Such notification shall include a description of the changes to the Bell Atlantic financial data processing systems. Reduction in the number of separate attestation audits below the currently approved level of three shall not take place until such notification is given, is reviewed by the Accounting and Audits Division Staff, and is approved by the Chief of the Accounting and Audits Division.

10. The action we take in this proceeding shall not be construed as permission to file combined Revenue Requirement Reports to the Commission for the companies utilizing the identical systems. We still expect to receive seven reports, one Revenue Requirement Report for each of the Bell Atlantic operating companies. While only three audit reports shall be required, it is our expectation that all seven Revenue Requirement Reports shall be included in the examinations made by independent auditors and shall be attested to.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to §§ 4(i), 4(j), 218, 219 and 220(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 218, 219 and 220(a), that Bell Atlantic's petition IS GRANTED, subject to the requirements in Paragraph 9 above.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Bell Atlantic telephone companies are The Bell Telephone Company of Pennsylvania (Bell of Pennsylvania), the four Chesapeake and Potomac Telephone Companies (C&P), The Diamond State Telephone Company (Diamond State), and New Jersey Bell Telephone Company (New Jersey Bell).

[2] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *petitions for further recon.* pending.

[3] Bell Atlantic filed the petition in the Joint Cost proceeding. However, the petition raises an issue that involves particular facts applicable to Bell Atlantic, rather than an issue that must be clarified in the Rule Making. Accordingly, we are treating the petition as a request for declaratory ruling under Section 1.2 of the Commission's Rules and resolving the issue pursuant to delegated authority under Section 0.291 of the Rules.

[4] On July 16, 1987, the Commission established an automated system for collecting financial and operating data required for administering the accounting, joint cost, jurisdictional separations, rate base disallowance, and access charge rules. *See Automated Reporting Requirements* for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, *Report and Order*, 2 FCC Rcd 5770 (1987), *petitions for recon. pending*. The joint cost data included in the required reports is subject to audit under the requirements in the *Joint Cost Order*, 2 FCC Rcd at 1330, para. 254.

[5] We conditionally approved this manual. *See*, Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, AAD 7-1671, *Memorandum Opinion and Order*, 3 FCC Rcd 109 (1988).

[6] *Joint Cost Order*, 2 FCC Rcd at 1330, para. 254.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN PIONEER TELEPHONE INCORPORATED — File No. I-T-C-88-200

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 31, 1988; Released: November 10, 1988

By the Chief, International Facilities Division:

1. The above captioned application, filed on August 24, 1988 by American Pioneer Telephone, Incorporated (APT) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on September 7, 1988. No comments were received.

2. The applicant is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by APT.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-200 IS GRANTED, and APT is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED the the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-510

In the Matter of

Improved Methods for Calculating
Groundwave Field Strength in the
AM Broadcast Band

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1988; Released: November 10, 1988

By the Commission:

INTRODUCTION

1. The Commission is initiating this *Notice of Proposed Rule Making* to examine its Rules relating to groundwave propagation in the AM broadcast service. In particular, the Commission is considering replacing the existing groundwave propagation curves contained in the FCC Rules with groundwave propagation curves recently developed. The Commission believes that these new curves are more accurate and their use would provide a better depiction of groundwave service and interference in the AM broadcast band.

2. This proceeding is an outgrowth of the *Notice of Inquiry*, MM Docket No. 87-267, 52 FR 31795, August 24, 1987, (*Inquiry*) which provided a comprehensive review of the Commission's AM broadcast assignment criteria and related matters.[1] The goal of the *Inquiry* was to identify any changes to the Commission's Rules which would permit AM stations to improve their service to the public and enhance their ability to compete in the market place.

3. The Commission discussed a number of issues specifically related to the calculation of groundwave field strength in its *Inquiry*. In particular, one alternative discussed is to replace all of the current groundwave propagation curves in the FCC Rules with improved groundwave propagation curves recently developed by the Commission's staff. Several related matters were also discussed in the *Inquiry*, notably, the need to revise the current FCC ground conductivity map (Figure M3) and revision of the current FCC method used to calculate groundwave field strength over paths containing more than one conductivity value.

4. We recognize that changes to the Commission's Rules to reflect new procedures for calculating groundwave field strength may well have, among other things, an effect on the portrayal of existing service and interference as well as an effect upon future calculations related to new and modified AM facilities. However, we believe that consideration at this time of procedures providing improved accuracy would facilitate future consideration of other possible changes to the Commission's technical assignment criteria. This would provide accurate groundwave field strength calculations for use in assessing the interrelationships of such proposed changes. Ultimately, improved accuracy in groundwave calculations would ensure that proposed new or modified AM stations would provide intended protection to other stations, or, conversely, that such proposed changes would not be unnecessarily restricted.

5. A substantial number of public comments which addressed groundwave propagation issues were received in response to the *Inquiry*.[2] These comments provide a general consensus supporting consideration of new methods for calculating groundwave field strength as suggested by the Commission in its *Inquiry*. For all of the reasons discussed, we believe that the time is now ripe for considering changes to the procedures for calculating groundwave field strength as proposed in the following sections.[3] Before addressing these proposed changes, however, the following background information is provided.

BACKGROUND

6. In contrast to the other frequency bands where broadcast services are authorized, the propagation characteristics of the AM broadcast band vary with the time of day. During daytime hours, signal propagation of an AM station is predominantly by groundwave signals. Groundwave signals travel along the surface of the earth and are thus affected by the characteristics of ground conductivity along the propagation path.

7. During nighttime hours, however, skywave signals from an AM station reach distances many times greater than its groundwave signals. Skywave signals are reflected from the ionosphere and can be propagated many hundreds of miles from the transmitter location. Nighttime propagation has both positive and negative implications. On the one hand, nighttime skywave can be employed to provide skywave service many hundreds of miles from the transmitter, whereas, on the other hand, such enhanced conditions also increase the interference possibilities of co-channel stations over distances of hundreds of miles. As a consequence, co-channel stations that could be located reasonably close to one another without experiencing interference during daytime hours could cause significant mutual interference during nighttime hours.

8. A fundamental characteristic of groundwave propagation is that the signal radiated from an AM station is at a maximum at or near the transmitter site and diminishes in strength as the distance from the station increases. Groundwave field strength calculations are performed in accordance with Section 73.183 of the FCC Rules. These procedures make use of the groundwave propagation curves contained in Section 73.184 of the FCC Rules[4] as well as FCC Figure M3 which portrays estimated effective ground conductivities throughout the United States.[5] Procedures are also included for determining ground conductivity from field strength measurements which may be used in lieu of ground conductivity values obtained from Figure M3.

9. Significant advances were made in groundwave propagation theory in the late 1930s, and the FCC developed a full set of groundwave propagation graphs based upon that theory in 1939. These curves, which were prescribed by the FCC Rules until 1985, were drawn on the basis of exact mathematical computations for the field strength out to approximately 80 kilometers and also at much greater distances, typically beginning at approximately 320 km. It was necessary, however, to use freehand drawing to complete the curves at the intermediate distances because the

required computations for this region were too laborious to perform and the underlying mathematics was not fully established at that time. An additional very low conductivity curve was added to each of the original graphs in 1954. When these low conductivity curves were added, freehand drawing was still necessary to depict the field strength values at the intermediate distances.

10. In preparation for the Regional Administrative Radio Conference for AM broadcasting convened in 1980,[6] a computer program was developed by the Commission for recalculating a new set of groundwave curves for consideration by the Conference. These new groundwave propagation curves were drawn in metric format and extended to 10,000 km.[7] The field strength values derived from the new curves agreed to within one or two decibels with values from the curves in the FCC Rules. However, the computer program developed to produce the new curves did not overcome the difficulties previously encountered in calculating field strength values for intermediate distances since the mathematics involved still did not provide an adequate solution. Thus, it was necessary to force a match between the two portions of the curves where calculations were possible.

11. In implementing the Final Acts of the Region 2 Conference (1981), the Commission conducted a rule making proceeding for the purpose of aligning the domestic technical standards with those in international agreements.[8] At the conclusion of the rule making, the Commission adopted the groundwave propagation curves for domestic use.[9] Although in a different format, these curves were consistent with those adopted at the Conference.

12. The Commission staff continued its efforts to improve further the accuracy of the FCC groundwave curves. In February 1986, the Commission released a report, FCC/OET R86-1,[10] which described a new computer program incorporating solutions to the previous mathematical deficiencies. Use of that computer program permited precise field strength calculations to be performed at all distances, including the previously troublesome intermediate distances. The computer program was used to compute the groundwave curves for the band 1605-1705 kHz that were proposed by the United States to the First Session of the Conference[11] convened in 1986 to expand the AM broadcast band from 1605 to 1705 kHz.[12] This computer program is capable of calculating new groundwave curves for the band 535-1605 kHz.

DISCUSSION

13. The Commission has identified shortcomings in the current FCC groundwave field strength calculation procedures, the importance of which is magnified by the continuing demand for spectrum and growing concerns regarding interference as the AM broadcast band becomes more congested. Shortcomings in these procedures discussed in the *Inquiry* included: (1) the groundwave propagation curves, Graphs 1 to 19 of Section 73.184 of the FCC Rules, are not fully consistent with formulas in engineering texts; (2) the method described in the FCC Rules to adjust for a dielectric constant different from the standard value used in drawing the curves is not easily applied;[13] (3) the ground conductivity map, Figure M3, does not accurately depict ground conductivity values throughout the United States; and (4) the FCC method used to calculate groundwave field strength over paths containing more than one conductivity value is limited in its application.

14. Based upon the public comments received in the *Inquiry* and our own assessment of the issues raised in these matters, we are proposing new groundwave propagation curves derived from the 1986 computer program to replace the current curves in Section 73.184 of the FCC Rules. However, as discussed in detail *infra*, we are deferring consideration of the other issues related to groundwave calculation procedures.

15. *New Groundwave Propagation Curves.* The present FCC groundwave propagation curves appear to be sufficiently accurate over the ranges where precise calculations for their development were possible. However, there is a significant range of distances for these curves over which precise field strength calculations were not performed during their development. As a consequence, their use in certain instances results in an inaccurate portrayal of service and interference for AM broadcast stations.

16. For these reasons, in the *Inquiry* we discussed the desirability of developing new groundwave propagation curves to replace the curves currently in the FCC Rules. Comments filed in response to the *Inquiry* were overwhelmingly in favor of using the most advanced methods available for performing groundwave field strength calculations and recommended development of the revised curves. In their comments, the National Association of Broadcasters (NAB) and other parties urge the Commission to establish technical standards and calculation methods that would more accurately depict the service and interference in the AM broadcast band. CBS, Inc. (CBS) notes that where accurate determinations of interfering signals and protected contours are not available, interference may be caused where none was calculated, or the parameters of a station may be unnecessarily constrained. In addition, the Association for Broadcast Engineering Standards, Inc. (ABES) believes that it would be desirable to revise Graphs 1 to 19 to agree more closely with engineering formulas in order to simplify calculator or computer aided analyzing processes.[14]

17. Another matter discussed in the *Inquiry* concerns the conversion of Graph 20 of Section 73.184 of the FCC Rules from English to metric units. All commenters agreed that conversion to metric is desirable except for Schober who stated that the graph is unnecessary since the curves may be calculated directly by use of a computer.[15]

18. In view of the recommendations we received in the comments and the improved accuracy[16] that would be derived from adoption of improved groundwave propagation curves, we propose amending the Rules to incorporate the use of new groundwave propagation curves which are based upon the report, FCC/OET86-1.[17] Sample draft curves, reduced in size, are included in Appendix B of this *Notice*. A complete set of draft curves drawn to full scale is being placed in the record of this proceeding. In addition, we propose to convert Graph 20 to metric units in order to facilitate its use.[18] Comments are invited on these proposed changes, and, in addition, the Commission will consider alternative proposals which may provide potential improvements related to calculating groundwave field strength in the AM broadcast service.

19. *Improvements to FCC Figure M3.* Since the development of FCC Figure M3 in 1954, substantial ground conductivity measurement data has been collected by the FCC as a result of field strength measurements related to con-

struction and testing of AM broadcast antenna systems. These measurements have demonstrated the inaccuracies of Figure M3.[19] Section 73.183(c) of the Rules recognizes the limitations of Figure M3 and prescribes its use only when accurate and acceptable measurements have not been made.[20]

20. An alternative discussed in the *Inquiry* was the possibility of using the groundwave field strength measurements on file with the FCC to revise Figure M3. The Commission also noted in the *Inquiry* that other government agencies have been performing tasks related to collection of groundwave conductivity data and questioned whether such data would be appropriate to use if Figure M3 were revised.[21]

21. There was unanimous support in the comments received in response to the *Inquiry* to undertake steps to improve the accuracy of the ground conductivity map, FCC Figure M3. The comments of CBS are typical. CBS agrees with the *Notice*'s assessment of deficiencies in Figure M3 and believes the Commission should conduct a rule making to consider the issues surrounding revision and updating of Figure M3. According to CBS, it has long been known that Figure M3 is an imprecise guide and that inadequacies in the ground conductivity estimates taken from it limit the accuracy of calculations of AM groundwave propagation. In addition, CBS notes that the imprecision inherent in the present map unduly complicates and adds to the cost of AM engineering practice, as actual field strength measurements must be made in many instances where the Figure M3 conductivity value is unsuitable. On the matter of considering the use of ground conductivity data from other agencies, such as the FAA, the majority of the comments provided little support. Moreover, one commenter specifically opposed their use citing the fact that the FAA continues to employ FCC Figure M3 as the basis for its current frequency allocation studies.[22]

22. One dominant and recurring theme appears in the comments on this matter. That is, commenters note the complexity of the task to compile a data base of groundwave field strength measurements and to revise FCC Figure M3. ABES, for example, urges the Commission to take the lead in a project which, because of its complexity and great cost, can only be effectively undertaken at the governmental level.[23] This view was shared by many other commenters as well.

23. We agree that improvement of Figure M3 is both a desirable and substantial undertaking. This issue was raised in the *Inquiry* to provide the opportunity to identify possible approaches for updating Figure M3 that would not exceed available resources both within the industry and the FCC. In view of the comments received on this matter, it appears that the only viable alternative for updating Figure M3 is for the FCC to undertake the task, possibly through a contract. The Commission agrees with the comments regarding the anticipated substantial costs of such a project. Currently, there are no funds available for such a project and, in view of budget restrictions, it is not anticipated that such funding would be available anytime in the near future. In view of this, we are deferring further consideration of this matter until funding becomes feasible.

24. *Calculations over mixed paths.* Section 73.183(e) of the FCC rules prescribes the procedure to be used when calculating groundwave field strength over paths containing more than one conductivity value (mixed paths). This is referred to as the equivalent distance method or "Kirke method" after H. L. Kirke who described several calculation methodologies and compared results of calculations with actual measurements in 1949. Predictions by the Kirke method are known to be imperfect and we explored alternative procedures in the *Inquiry*.[24]

25. The comments on this subject were mixed. Most commenters suggested the continued use of the "Kirke" method while some recommended consideration of other methods. None, however, identified any other method which would be a worthwhile improvement. AFCCE finds the "Kirke Method" acceptable and it does not foresee that a change in methodology would result in a substantial increase in accuracy in the prediction of groundwave field strength contours whether for service or for interference situations. Robert A. Jones notes that the present method has served the AM broadcast service well over the years and suggests no change. After considering the comments, we have concluded that it would not be useful to attempt to improve on the Kirke method at this time. Commenters in this proceeding who have specific proposals to offer or definitive studies on this subject are invited to submit such material for our further consideration.

OTHER MATTERS

26. A general matter was raised by several commenters concerning implementation of new groundwave propagation curves and the relationship of this issue with other technical assignment criteria. WGN Continental Broadcasting Company (WGN), for example, believes that the issues surrounding groundwave propagation are so closely related to the allocations issues to be addressed later by the Commission that consideration of them at this point is premature. WGN, thus, requests the Commission to defer changes in the groundwave propagation rules until a review of the related allocations issues has been concluded. The Clear Channel Broadcasting Service (CCBS) urges the Commission to proceed with caution in developing new standards because of concerns about the possible disruptions of service that could result with such changes.

27. As we discussed *supra*, we are cognizant of the relationship between the groundwave propagation curves which we are considering in this *Notice* and other assignment criteria that may be considered in future rule making proceedings. We noted in the *Inquiry* that use of new technical standards could result in changes to the location of service contours and calculated levels of interference. We do not believe, however, that this fact should restrict us from proceeding with rule making at this time in order to develop a record on this issue. Such a record will guide the Commission on appropriate actions which ultimately should be taken.

28. We also believe, however, that there may be practical reasons for considering a delay in implementing new groundwave propagation curves, if adopted, until consideration of other possible changes to interrelated technical assignment criteria is concluded. Rather than implementing various changes to the technical assignment criteria in a "piece meal" fashion, we believe that there is merit in considering implementing simultaneously all the interrelated changes that may ultimately be adopted. We believe that this approach would minimize administrative burdens for the Commission as well as uncertainties within the industry. We seek comment on the advisability of such an approach.

29. It would not be our intent to require any modifications of existing AM broadcast facilities as a result of the changes proposed in this *Notice*; nor would we intend to require parties whose applications are pending at the time any proposed rule changes are implemented to amend their application.

ADMINISTRATIVE MATTERS

30. Authority for the rule changes on which comments are invited is contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307.

31. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 3, 1989** and reply comments on or before **January 18, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference (Rm. 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

32. For the purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

33. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1201(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

34. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is attached as Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981).

35. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase burden hours imposed on the public.

36. For further information on this proceeding, contact Larry W. Olson, Mass Media Bureau, (202) 632-6955.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. Reason for Action:

In this proceeding, we seek public comment on the desirability of replacing the existing AM broadcast groundwave propagation curves with a new propagation model recently developed. The new model results from recent scientific analysis of groundwave measurement data and theory that provides a better understanding of groundwave propagation phenomena. Use of the new method for calculating groundwave field strength in the AM service would provide a more accurate depiction of the service and interference relationships between AM stations.

II. Objective:

The proposed changes are intended to modify provisions of the Rules which have been found to be inaccurate. This is in keeping with the Commission's efforts to update and improve the standards upon which the AM service is based so as to reflect the actual representation of service and interference.

III. Legal Basis:

Sections 4(i), 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303, and 307.

IV. Description, Potential Impact and Number of Small Entities Affected:

There are approximately 5000 AM broadcast stations in the United States. None of these stations should be affected directly by this proposal since the changes proposed only relate to the standards (curves and formulas) used to calculate groundwave field strength. We expect no negative impact to these stations, small entities or large, as we are not mandating any new requirements or showings. Actual interference is not expected to increase as a result of the specific changes proposed in this *Notice*. We will, however, consider in future rule making proceedings the related questions regarding assignment principles which, together with the propagation model, may result in new definitions of service and interference for AM broadcast stations. Such definitions are not now known but are intended to be beneficial to the AM service as a whole.

V. Reporting Record Keeping, and other Compliance requirements:

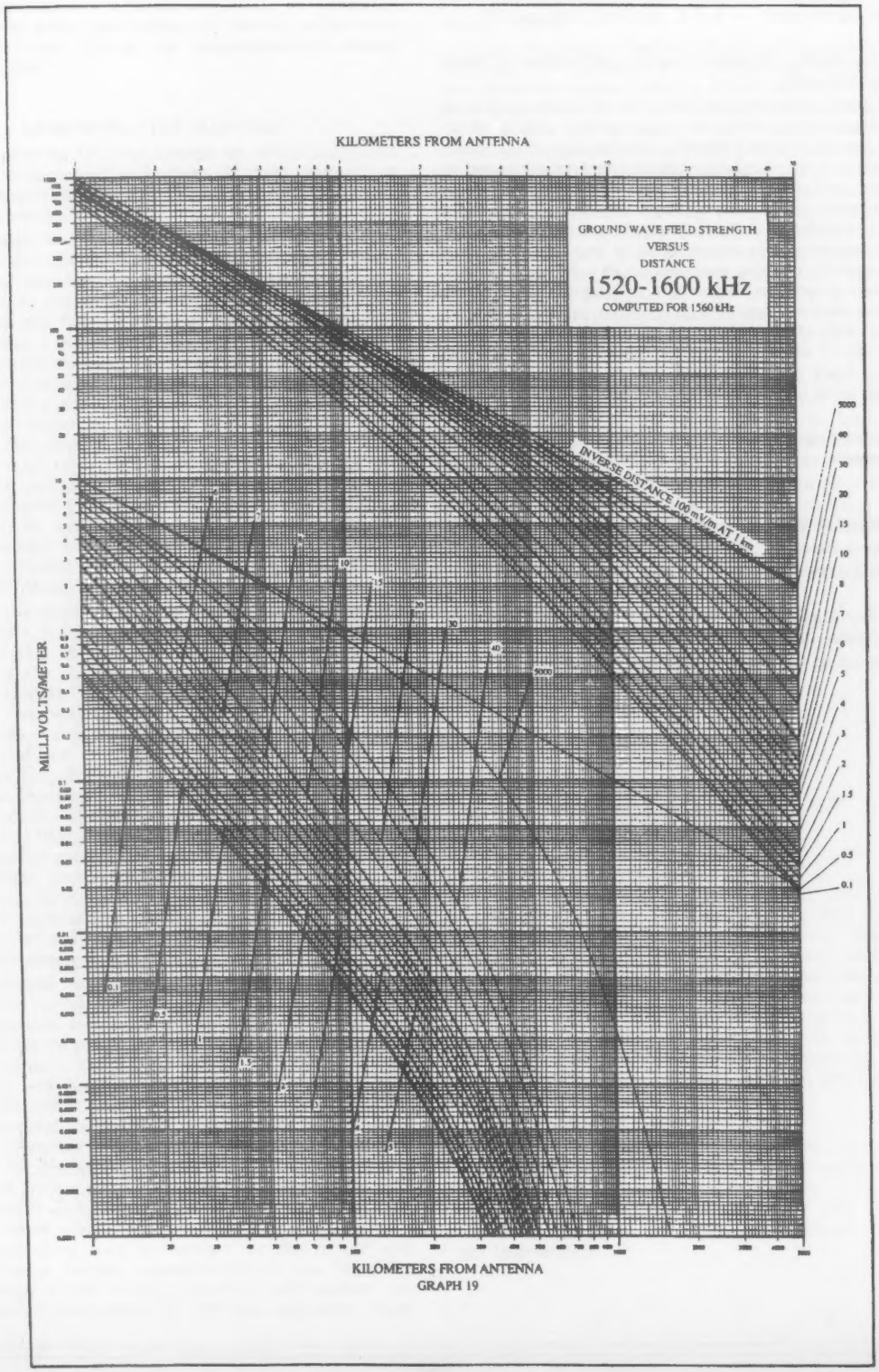
There is no additional impact.

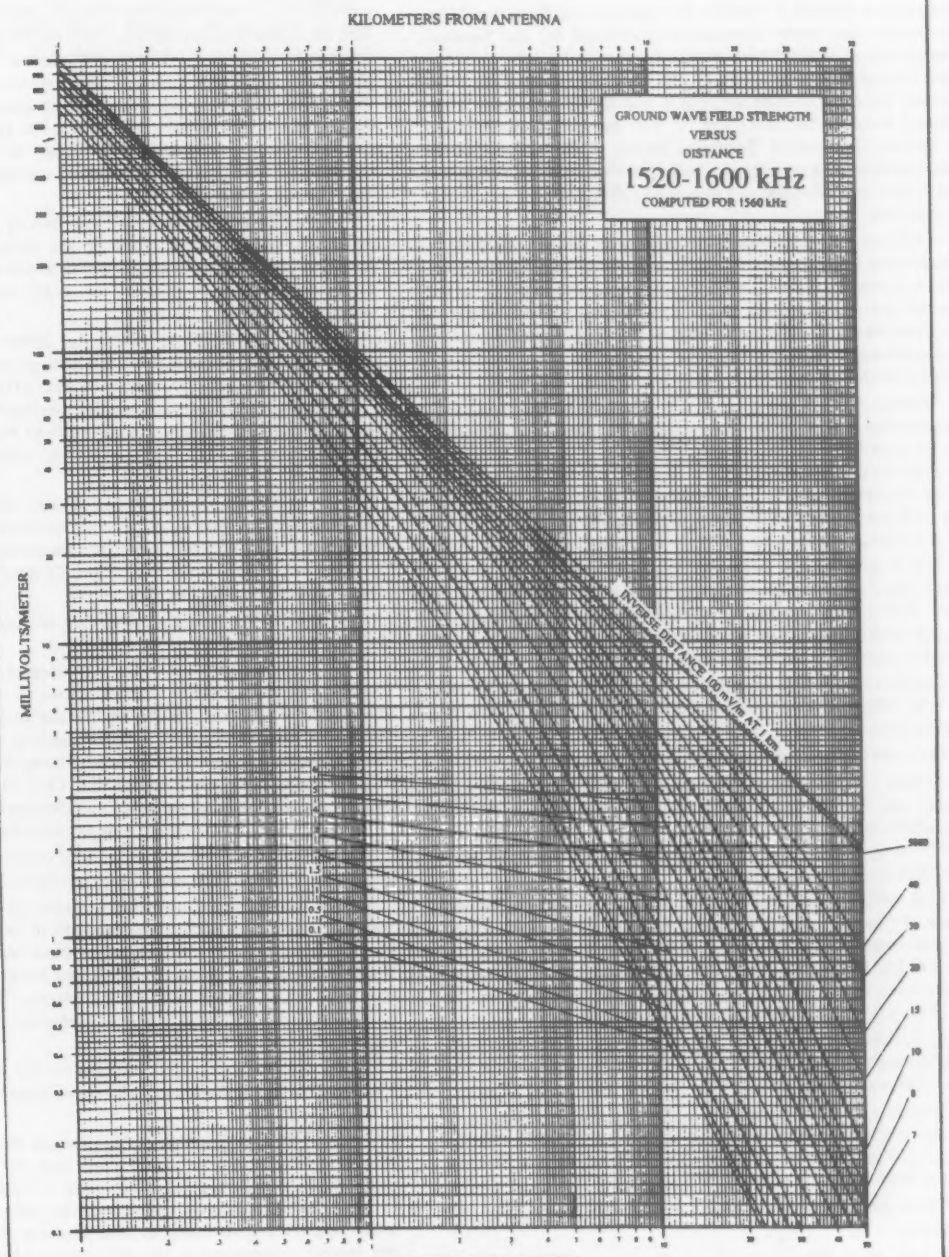
VI. Federal Rules that Overlap, Duplicate or Conflict with These Rules:

There is no overlap, duplication, or conflict.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:

There are no significant alternatives available.


KILOMETERS FROM ANTENNA
GROUND WAVE FIELD STRENGTH
VERSUS
DISTANCE
1520-1600 kHz
COMPUTED FOR 1560 kHz
INVERSE DISTANCE 100 mV/m AT 1 km
MILLIVOLTS/METER
KILOMETERS FROM ANTENNA
GRAPH 19


KILOMETERS FROM ANTENNA
GROUND WAVE FIELD STRENGTH
VERSUS
DISTANCE
1520-1600 kHz
COMPUTED FOR 1560 kHz
INVERSE DISTANCE (1 mV/m at 1 km)
MILLIVOLTS/METER
KILOMETERS FROM ANTENNA

GRAPH 19-A

FOOTNOTES

[1] The *Inquiry* was issued after review of the comments received in response to the Mass Media Bureau's *Report on the Status of the AM Broadcast Rules*, RM-5532, (*Report*) released April 3, 1986. The *Report* discussed the status of AM broadcasting and addressed a large number of technical, legal, and policy issues.

[2] By *Order*, DA 87-1823, released December 15, 1987, the Commission granted a "Motion for Extension of Time for Filing Comments and Reply Comments" submitted by the National Association of Broadcasters (NAB). In that *Order*, the Commission bifurcated the proceeding and established separate filing periods. Phase 1 involved Sections II and III of the *Inquiry* while Phase 2 involved Sections I and IV. For the specific issues raised in Section III (Related Technical Issues) of the *Inquiry* under which groundwave propagation falls, the time for filing comments and replies was extended to February 1, 1988 and March 1, 1988, respectively.

[3] This proceeding will examine only those issues pertaining to groundwave propagation. Where appropriate, the Commission will institute future rule making proceedings to deal with the remaining issues addressed in the *Inquiry* and public comments. For example, in a similar action today, the Commission instituted a proceeding concerning skywave propagation. *See, Notice of Proposed Rule Making*, MM Docket No. 88-508, FCC 88-324.

[4] Graphs 1 to 19 are plotted for various AM broadcast frequencies and describe groundwave field strength as a function of the distance from the transmitter. Generally, for a given station the groundwave field strength at a specified distance is a function of the frequency and the earth's conductivity along the propagation path (*i.e.*, it varies inversely with frequency and directly with ground conductivity).

[5] FCC Figure M3 was developed more than thirty years ago by correlating field strength measurement data with identified soil types. This process resulted in a very generalized depiction of ground conductivity in the United States with broad areas on the map delineated by individual conductivity values.

[6] Regional Adminstrative MF Broadcasting Conference (Region 2). First Session, Buenos Aires, 1980; Second Session, Rio de Janeiro, 1981.

[7] These curves were later adopted by the Conference.

[8] At that time, negotiations on new bilateral agreements with Canada and Mexico either had been completed or were nearing completion. In both cases, negotiations were conducted with the view to incorporating the groundwave propagation curves adopted at the Rio Conference (1981).

[9] FCC MM Docket No. 84-752, Report and Order "In the Matter of Changes in AM Technical Rules to Reflect New International Agreements," published in the *Federal Register* May 2, 1985 (50 FR 18818). The computer program used for calculating these curves was subsequently released to the public for use in lieu of curves for calculating groundwave field strength.

[10] R. P. Eckert, "Modern Methods for Calculating Ground-wave Field Strength over a Smooth Spherical Earth", Report FCC/OET R86-1, February 1986.

[11] Regional Administrative Radio Conference to Establish a Plan for the Broadcasting Service in the Band 1605-1705 kHz in Region 2. First Session, Geneva, 1986; Second Session, Rio de Janeiro, 1988.

[12] These groundwave propagation curves were adopted by the Conference.

[13] Graph 20 of Section 73.184, of the Rules, "Ground Wave Field Intensity versus Numerical Distance of a Plane Earth," is provided for this purpose. However, it is in English units (miles) and therefore unwieldy since the related curves are in metric units (kilometers). The computer programs released in MM Docket No. 84-752 may be used in lieu of Graph 20.

[14] Two commenters addressed the international implications. Edward A. Schober (Schober) stated that these graphs should have been included in the international negotiations with Mexico and Canada; and, unless the agreements can be modified to include the revised graphs, the current graphs should be retained. Karl D. Lahm (Lahm) believes that the Commission should encourage other Region 2 administrations, particularly Canada and Mexico, to do the same in order to maintain consistent technical methods for all allocation purposes. Our intent at this time would be to use the new graphs, if adopted, for domestic purposes. If the new groundwave curves are adopted, we would explore with Canada and Mexico the possibility of incorporating their use in our bilateral agreements.

[15] Although not addressed in the *Inquiry*, Lahm suggested a change in the horizontal scale of the printed graphs and the density of the grid in order to facilitate curve reading and measurement analysis. A number of reply comments supported Lahm's suggestion.

[16] As an example of the differences between the current FCC groundwave curves and those we are proposing, Commission studies show that for a frequency of 1000 kHz and a conductivity of 10 mmhos/m the groundwave field strengths derived from the proposed curves at distance ranges of 0-80, 80-320, and 320-4220 km are at most 0.5, 1.5, and 6.6 dB lower, respectively, than those derived from the current curves.

[17] For reference, we are placing a copy of this report in the record of this proceeding. The computer program reproduced in the report could also be used for calculating groundwave field strength in lieu of the printed curves. Comments are solicited on the format of the draft curves.

[18] The computer program described in Report FCC/OET86-1 can be employed in lieu of Graph 20.

[19] On December 15, 1980, the FCC released a *Notice of Inquiry* in BC Docket No. 80-757, In the Matter of Amendment of the Rules concerning Automation of the use of Measurement Data for AM Broadcast Stations. This proceeding solicited comments concerning development of a data base comprising all outstanding measurement data submitted to the FCC for AM assignment studies. A consideration included was development of a digitized conductivity map based on the measurement data.

[20] Also, Figure M3 does not include conductivity information for Alaska, Hawaii, or United States territories.

[21] The Federal Aviation Administration (FAA) also has collected ground conductivity data relevant to aeronautical beacons in the band 200-415 kHz and maps have been produced with more detail in some areas of the United States than FCC Figure M3. *See*, S. A. Arcone and A. J. Delaney, "Electrical Ground Impedance Measurements in the U.S. between 200 and 415 kHz", Report No. FAA-RD-78-103, 1978.

[22] *See*, September 8, 1987, edition of the FAA's "Spectrum Management Regulations and Procedures Manual" (6050.32), Figure 11-2 (page 103).

[23] In noting that all commenters favored the updating of the ground conductivity map, ABES states that the problem with the revision of the ground conductivity map is finding someone who, in these days of austerity, can absorb the costs of such an enormous undertaking. As stated in its comments, ABES believes that the federal government is the only entity with the capacity of completing that task and urges the Commission to approach the Office of Management and Budget, the Congress and the National Telecommunications and Information Administration for the funds and facilities required.

[24] One of the alternative methods discussed was the "Millington" method. *See*, G. Millington, "Ground Wave Propagation over an Inhomogeneous Smooth Earth", *Proc. of the Institution of Electrical Engineers (London)*, Part III, Vol. 96, pp. 53-64, January 1949; H. L. Kirke, "Calculation of Ground-wave Field Strength over a Composite Land and Sea path", *Proceedings of the IRE*, Vol. 37, May 1949, pp. 489-496; J. R. Wait, "Recent Analytical Investigations of Electromagnetic Ground Wave Propagation over Inhomogeneous Earth Models", *Proceedings of the IEEE*, Vol. 62, pp. 1061-1072, August 1974.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

AMERICAN MOBILPHONE, INC. File No. 26486-CD-P/L-1-87

For Additional Facilities on
PLMS Station KNKC419 to Operate
on 152.78 MHz at St. Petersburg
and Lakeland, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1988; Released: November 10, 1988

By the Chief, Mobile Services Division:

1. General Telephone Company of Florida (General) filed a petition to deny the captioned application of American Mobilphone, Inc. (American) for two facilities to operate on frequency 152.78 MHz at St. Petersburg and Lakeland, Florida. American filed an opposition.

2. American's proposed stations are on the same frequency as General's stations at Bee Ridge, Florida (KIY-397) and, New Port Richey, Florida (KUS-358). General argues that American's proposed station in St. Petersburg will cause harmful interference to General's existing station at Bee Ridge, Florida along its 20 and 30 degree radials. In addition, General contends, there exists a greater probability of interference to its Bee Ridge and New Port Richey stations than is predicted by the Carey Report because of the flat terrain between its stations and the proposed St. Petersburg location. American responds that the amount of interference at the proposed St. Petersburg station is scarcely above the amount considered acceptable by the Carey Report, and has submitted an amendment to its application to remove the objectionable harmful interference. American contends, however, it is entitled to rely on the Carey analysis in its application as General has not provided alternative interference calculations or field measurements to support its claim that the Carey analysis is inaccurate.

3. General contends that American has not made an interference-free showing in support of the proposed Lakeland, Florida station and that the proposed antenna radiation pattern is significantly different from the pattern described by the manufacturer of the proposed antenna. Therefore, General argues that the interference calculations supporting the Lakeland station are invalid. In response, American claims to have inadvertently used the wrong antenna pattern from the manufacturer's catalog, and has submitted an amendment to its application to show the correct antenna pattern. Using the correct pattern, American asserts, the Lakeland location will not cause harmful interference to General's existing stations.[1]

4. We find American's application as amended will not cause interference to General's Bee Ridge station along its 20 and 30 degree radials. We further find that with the corrected antenna pattern, the proposed Lakeland location will not cause interference to General's Bee Ridge or New Port Richey stations. The amendments will neither cause a substantial change in American's service proposal nor enlarge the reliable service area. After reviewing American's application, we find the application as amended does not cause harmful interference to General's existing stations.[2]

ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED that the application is American Mobilphone, Inc., File No. 26486-CD-P/L-1-87 IS GRANTED.

6. IT IS FURTHER ORDERED that the Petition to Deny filed by General Telephone Company of Florida IS DENIED.

7. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 of applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] General has not opposed either amendment.

[2] General's objection to the use of the Carey methodology is without merit. General has not provided the necessary engineering data and calculations to support its position that there is a "greater probability" of interference between the existing and proposed stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-236

In re Applications of

KEY BROADCASTING CORPORATION	File No. BPH-850709MK
Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I	File No. BPH-850712ZD
FENWICK ISLAND COMMUNICATIONS, INC.	File No. BPH-850712ZE
GLORIA J. FERNANDEZ-PEREYO MERRYMAN	File No. BPH-850712ZI

For Construction Permit
for a New FM Station in
Fenwick Island, Delaware

Appearances

Lauren A. Colby and *Arthur V. Belendiuk* on behalf of Key Broadcasting Corporation; *Robert E. Levine* and *Jeffrey L. Sheldon* on behalf of Fenwick Island Broadcast Limited Partnership I; *William E. Kennard* and *Dean R. Brenner* on behalf of Fenwick Island Communications, Inc.; *Henry A. Solomon* and *Kathleen Victory* on behalf of Gloria J. Fernandez-Pereyo Merryman; and *Arthur L. Steinberg* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOHN M. FRYSIAK

Issued: November 1, 1988; Released: November 14, 1988

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Key Broadcasting Corporation (Key), Fenwick Island Broadcast Limited Partnership I (Fenwick L.P.), Fenwick Island Communications, Inc. (FIC), and Gloria J. Fernandez-Pereyo Merryman (Merryman) for a construction permit for a new FM broadcast station to be operated on Channel 221A (92.1 MHz) at Fenwick Island, Delaware. The applications of nine other applicants for the proposed facility were dismissed.[1]

2. The applications were designated for hearing on the following issues:

> To determine which of the proposals would, on a comparative basis, best serve the public interest, and
>
> To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

Hearing Designation Order, DA 87-746, released July 1, 1987 (HDO). In addition, the HDO required a determination as to the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas (*Id.* para. 10).

3. The need for a comparison of signal coverage was resolved by stipulation among all parties, which provided that

> [All parties] stipulate and agree that there are no significant differences in the engineering coverage of the applicants in the above-referenced proceeding and that, accordingly, no useful purpose would be served by the submission of an exhibit showing the areas and populations served by the respective applicants.

(Key Exh. 4).

4. By *MO & O*, FCC 87M-2264, released September 21, 1987, the following issues were added against Key:

> To determine whether Key Broadcasting Corporation ever had reasonable assurance that its proposed transmitter site would be available to it, and if not, the effect of such upon Key's basic and/or comparative qualifications to be a Commission licensee.
>
> To determine whether Key Broadcasting Corporation made a willful misrepresentation to the Commission proposing a transmitter site without having made adequate inquiries as to its availability and, if so, the effect of such upon Key's basic and/or comparative qualifications to be a Commission licensee.
>
> To determine whether Key Broadcasting Corporation broadcast information related to a lottery, and if so, the effect thereto on Key's basic qualifications to be a Commission licensee.
>
> To determine whether Key Broadcasting Corporation violated Section 1.65 of the Commission's Rules by failing to report the pendency of a Commission investigation as to the broadcast of lottery information at WQSR(FM), licensed to Key, and for its failure to report the Commission's adverse finding with respect to that investigation; and if Key is found to have violated Section 1.65, the effect thereof on Key's basic and/or comparative qualifications to be a Commission licensee.

5. By *MO & O*, FCC 87-2794, released November 6, 1987, the following issues were added against Fenwick L.P.:

To determine whether Fenwick L.P violated Section 1.65 of the Commission's Rules and Regulations by failing to timely report the criminal proceedings against Lester Green;

To determine, in light of the evidence adduced under the foregoing issue, whether Fenwick L.P. possesses the requisite qualifications to be a Commission licensee; and

To determine whether in light of the conviction of Lester L. Green of violations of Title 18, Sections 387 and 1001 of the U.S. Code, Fenwick L.P. possesses the requisite basic qualifications to be a Commission licensee.

6. By *MO & O*, FCC 87M-3020, released November 23, 1987, the following issues were added against Fenwick L.P.:

To determine whether Leonard Berger, M.D., is the real party in interest to the application of Fenwick L. P.:

To determine whether, in light of Dr. Berger's interest in an application for a construction permit for a new FM broadcast station at Ocean Pines, Maryland, and the existence of an overlap of the 1 mv/m contours of the Ocean Pines and Fenwick L. P. proposals, the continued prosecution of the Fenwick L. P. application violates the provisions of Section 73.3518 of the Commission's Rules, prohibiting inconsistent applications; and

To determine in light of the evidence adduced under the foregoing issues whether Fenwick L. P. possesses the basic qualifications required of a Commission licensee.

7. A prehearing conference was held on August 31, 1987 (Tr. 1-16). Hearings were held from January 26 - January 29, 1988. The record was closed on January 29, 1988 (Tr. 888), as further indicated by *Order*, FCC 88M-264, released February 3, 1988.

FINDINGS OF FACT

BASIC QUALIFYING ISSUES

Site Assurance/Misrepresentation--Key Broadcasting Corporation

8. Key's application for the Fenwick Island authorization was filed on July 9, 1985. Shortly before the application was filed, Carl G. Brenner, Key's executive vice president, had a discussion with Key's communications counsel concerning application filing procedures, including the need to find a suitable transmitter site. Key's counsel, Mr. Colby, recommended to Mr. Brenner that he employ a Mr. Sidney Bloom to locate a transmitter site. Mr. Brenner authorized Mr. Colby to speak to Mr. Bloom and was subsequently advised that Mr. Bloom was available to do the job. Mr. Brenner authorized Mr. Colby to retain Mr. Bloom to do the work (Key Exh. 6, pg. 1).

9. Mr. Colby contacted Mr. Bloom on or about June 29, 1985, and told him that his client Key Broadcasting Corporation was applying for a construction permit for a new FM broadcast station to be situated at Fenwick Island, Delaware, and that E. Harold Munn, Jr. of Coldwater, Michigan, would be preparing the engineering portion of the application, and that he would have the details concerning the size and proper location for this piece of land. Mr. Bloom was given a copy of a memo from Mr. Munn dated June 28, 1985, which memo he reviewed with Mr. Colby, and Mr. Bloom spoke directly with Mr. Carol Brenner, the executive vice president of Key Broadcasting Corporation, relative to his travel arrangements. Mr. Bloom also telephoned Mr. Munn and acquainted himself with the size of the property that would be needed and the restrictions on the location of that property (Key Exh. 7, pg. 1).

10. Mr. Bloom began to investigate the availability of a suitable transmitter site in the Fenwick Island area on July 2, 1985. Not having seen initially any properties with "for sale" signs which appeared to be suitable, he consulted a local realtor Gold Coast Realty at 6208 Coastal Highway, Ocean City, Maryland. Mr. Bloom met with C. Preston Phillips, who gave Mr. Bloom his business card and who identified himself as a realtor employed by the Gold Coast firm. Mr. Bloom told Mr. Phillips that he was looking for a tract of land to be used for the construction of a radio broadcasting tower and that he needed to ascertain whether such a piece of land would be available for lease and/or purchase and to determine the terms and conditions under which the land could be acquired. Mr. Phillips gave Mr. Bloom a multiple listing book and allowed him to inspect it in his office. Mr. Bloom went through the book, but initially did not find anything which appeared totally suitable (Key Exh. 7, pgs. 1, 2).

11. Mr. Bloom drove around some more that evening and saw a sign for the Todd Industrial Park. It occurred to him that a site in an industrial park would be ideal, because there would be a minimum of problems with people who might object to the creation of a radio tower. The next morning Mr. Bloom went back to Mr. Phillips' office and inquired about the industrial park. Mr. Phillips told Mr. Bloom that it was in the multiple listing and that lots in the park were for sale. Mr. Bloom investigated the matter further, ascertaining that the park was owned by an estate, and made a telephone call to the Registrar of Wills to ascertain the name of the attorney for the estate. The attorney turned out to be Joel J. Todd, and Mr. Bloom made a number of telephone calls until he tracked Joel Todd down and spoke with him. Joel Todd referred Mr. Bloom to Jerry Todd, a realtor whose company had the listing, and Mr. Bloom telephoned Jerry Todd and spoke with him. Mr. Bloom told Mr. Todd that he needed a piece of land for use as a radio tower site and needed to know whether there was a suitable lot for sale in the industrial park and the terms under which it would be available (Key Exh. 7, pg. 2). Mr. Bloom met with Jerry Todd at the industrial park at an office at the park site. Mr. Bloom also met with Mr. Todd at the office of the real estate company where Mr. Todd is employed, Moore, Warfield & Glick, Inc. Mr. Todd gave Mr. Bloom his business card and made arrangements for Mr. Bloom to pick up an 11 page document entitled "Offering for Sale." Mr. Todd confirmed that, as indicated in the multiple listing form, lots in the park were available for sale at a price of50,000 per lot (Key Exh. 7, pgs. 2, 3).

12. After inspecting the park and speaking with the manager of the park and with Mr. Todd, Mr. Bloom decided that Lot 15 would be the best location for the tower. Mr. Bloom went back to Mr. Phillips' office, tele-

phoned Mr. Munn in Coldwater, Michigan, and precisely described the location of Lot 15 to Mr. Munn. Mr. Munn confirmed that the site was suitable. Mr. Bloom made copies of a number of documents and sent them with a covering letter to Mr. Munn by Federal Express directly from Ocean City on the afternoon of July 3, 1985 (Key Exh. 7, pg. 3).

13. Mr. Bloom returned to Frederick and he advised Mr. Colby and Mr. Brenner that he had located a suitable parcel of land that it was available for purchase for50,000 (Key Exh. 7, pg. 3).

14. On Saturday, August 15, 1987, at 3:30 p.m., Mr. Bloom called Todd Construction Co. on the telephone. Mr. Bloom identified himself and spoke to a man who identified himself as Luke Todd. Luke Todd confirmed in response to Mr. Bloom's question that lots in the Todd Industrial Park were available for sale, and specifically that Lot 15 was still available (Key Exh. 7, pg. 3).

15. Mr. Bloom is satisfied that Mr. Phillips, as the selling realtor, had complete authority to present a contract to Mr. Todd, the listing realtor, for the sale of any of the lots in the industrial park specifically for Lot 15. Mr. Bloom is further completely satisfied that Lot 15 was vacant and available for sale and that Mr. Todd was then and is now perfectly agreeable to the sale of that lot for use as a radio station and for the construction of a tower (Key Exh. 7, pg. 3).

16. In response to a declaration executed by William Jerald Todd in which Mr. Todd averred that he did not remember Mr. Bloom, Mr. Bloom further testified that his visit to Mr. Todd's offices took place more than two years ago, and Mr. Bloom can understand that Mr. Todd might not remember him, as Mr. Bloom cannot say that he remembers much about Mr. Todd. Mr. Bloom did, however, visit Mr. Todd's offices at R.W. Todd and Sons in Bishopville, Maryland, and can prove that he did so, because on the occasion of his visit, Mr. Bloom got permission to use the telephone in the office to make calls to Key's legal and engineering counsel for the purpose of ascertaining if the lots which Mr. Todd had available were, in fact, suitable for the radio tower site. Mr. Bloom has submitted copies of telephone records from Key's counsel's files, showing that at least three calls took place that day. The calls were from and to telephone number (301) 352-5402, which is the number for R.W. Todd and Sons. One collect call from that number was made to Mr. Colby and two calls were received at that number from Mr. Colby. Additionally, the same telephones were used to call Mr. Munn and his telephone bills should reflect those calls (Key Exh. 8, pgs. 1, 2).

17. At the hearing, William G. Todd testified that he might, indeed, have spoken to Sidney Bloom concerning the availability of the transmitter site on the occasion of Mr. Bloom's visit to Ocean City in 1985 (Tr. 300). However, he could not specifically recall (Tr. 300). More importantly, however, Mr. Todd testified that he was, indeed, an agent for the Todd Industrial Park, authorized to sell lots in the park (Tr. 285, 298-299); that Lot 15 was, indeed, available for sale when Mr. Bloom visited Ocean City, and that the lot is still available for sale to Key Broadcasting Corporation for75,000 (Tr. 299).

Failure to Report -- Section 1.65 (Lottery) -- Key Broadcasting Corporation

18. Some time in 1986, Carl G. Brenner, executive vice president of Key, conceived of a promotion to be conducted by WQSR in support of the Save the Bay Foundation, an organization which is said to be a public interest group, dedicated to the preservation of the environment and particularly the Chesapeake Bay. Mr. Brenner was especially interested in the project because he is a yachtsman and user of the bay (Key Exh. 5, pg. 1).

19. The contest as conceived consisted of having members of the public guess the number of beer cans loaded on a boat. A member of the public desiring to enter the contest would pay1.00 for his entry, with the proceeds of the contest being turned over to the Foundation. Mr. Brenner was aware of the Commission's rules governing lotteries, but it was his opinion that the contest was a game of skill and that the element of chance was not present (Key Exh. 5, pg. 1).

20. The contest was conducted by Key and the proceeds were donated to the Foundation (Tr. 45). Key did not keep any part of the proceeds and did not realize any profit from the promotion. After the promotion was ended, Mr. Brenner received inquiries from the FCC suggesting that the contest was a lottery. Key received a letter dated May 5, 1987, from Edythe Wise, Chief Complaints and Investigations Branch, Federal Communications Commission, admonishing Key for broadcasting a lottery. The letter did not indicate that the Commission was imposing any administrative sanctions on Key. Mr. Brenner, therefore, considered that the matter was closed and that the Commission intended to take no disciplinary action and that no further report need be made to the Commission either in Key's Fenwick Island application or in any other manner (Key Exh. 5, pgs. 1, 2).

Failure to Report -- Section 1.65 (Criminal Conviction) -- Fenwick L. P.

21. Two of the original four stockholders, officers and directors of Fenwick L. P.'s general partner, Alfred J. Stewart and Lester L. Green, who together held 40 percent of the voting stock, subsequently resigned as officers and directors and assigned their stock interests due to felony indictments and convictions.

22. Mr. Stewart was convicted on a guilty plea of felony theft on March 10, 1987, in the Baltimore City Circuit Court. Dr. Berger, Fenwick L.P.'s limited partner, became aware of the conviction after having read about it in the newspaper. He brought the conviction to Ms. Lyon's attention. Ms. Lyon is the president and major stockholder of Fenwick L.P.'s general partner. A meeting of the Fenwick L. P. general partner shareholders, and Dr. Berger was held in Ocean City and Mr. Stewart was asked to and did resign as director and officer of the corporation (Tr. 630, 642, 644).

23. Fenwick L. P. subsequently amended its application on April 8, 1987 to bring this information to the Commission's attention. When he resigned from the corporation, Mr. Stewart assigned his stock interest to Ms. Lyon and Mr. Green in equal shares. Both Ms. Lyon and Mr. Green paid500 for their share of Mr. Stewart's interest (Tr. 645, 775).

24. Lester L. Green was indicted on charges of felony violations of United States Criminal Code Sections 287 and 1001 on May 19, 1987 and convicted of those charges

on September 17, 1987 (Key Exh. 11, p. 2). 18 U.S.C. §§ 287 and 1001 make felonies acts which constitute willful false or fraudulent statements to the United States Government or an agency thereof. In addition, Mr. Green was convicted of aiding and abetting in violation of 18 U.S.C. §2 for inducing others to violate a federal criminal statute.

25. Ms. Lyon learned of Mr. Green's indictment from Dr. Berger, who at the time was no longer a limited partner in Fenwick L. P. (Tr. 634). Dr. Berger learned of Mr. Green's indictment directly from Mr. Green when Mr. Green contacted him by telephone in Ocean City (*Id.*).

26. Mr. Green was asked and agreed to resign as an officer and director of Fenwick Island Broadcast Corp. just before his trial began (Fenwick L. P. Exh. 6, p. 3). At that time he assigned his 30 percent stock interest to Sharon Lyon for 1.00 (*Id.*).

27. Ms. Lyon admits that she understood the Commission's reporting rule (Section 1.65) requiring the disclosure of information necessary to keep the Fenwick L. P. application accurate and complete. Fenwick L. P. further submits that Mr. Green (and Mr. Stewart) answered negatively when expressly questioned during the preparation of the Fenwick L. P. application about whether they had ever been convicted of any crimes, or whether any proceedings were pending against them (Fenwick L. P. Exh. 6, p. 1; Tr. 749).

28. The Fenwick L. P. application was designated for hearing on July 1, 1987. Although the Fenwick L. P. principals were aware of Mr. Green's indictment in June, 1987 (Tr. 632), Fenwick L. P. did not amend its application to disclose the conviction of Lester Green, his withdrawal from the corporation and the resulting change in ownership interests until after his conviction in September, 1987 (Fenwick L. P. Exh. 6, p. 3).

29. Ms. Lyon claims that once aware of the indictment, unsuccessful efforts were made by Fenwick L. P.'s communications counsel to determine the nature of the charges against Mr. Green and the forum in which the case was lodged. Fenwick L. P.'s explanation for not timely disclosing this information was that it would have been futile to inform the Commission that Mr. Green had been indicted on criminal charges while efforts were being made to determine the nature of those charges. Ms. Lyon also claims that Fenwick L. P. delayed amending its application to disclose the indictment, a pending proceeding required to be disclosed by the application, Form 301, because Fenwick L. P.

Real - Party - in - Interest/Inconsistent Application Issue

30. Fenwick L. P. is a limited partnership organized under the laws of Maryland (Fenwick L. P. Exh. 1, p. 1). The original principals of Fenwick L. P. were Leonard P. Berger, M.D., as 80 percent limited partner, and the Fenwick Island Broadcast Corporation (FIBC), a Maryland corporation, as 20 percent general partner (*Id.*).

31. FIBC's original shareholders, officers, and directors (as of July 11, 1985) were: Sharon V. Lyon, President, Director and 49 percent shareholder; Lester L. Green, Vice President, Treasurer, Director and 20 percent shareholder; Alfred J. Stewart, Secretary, Director and 20 percent shareholder; and Elijah Saunders, M.D., Vice President, Director, and 11 percent shareholder (*Id.*).

32. Prior to becoming involved with Fenwick L. P., Dr. Berger was active in the cable television business (Tr. 599, 601, 602). Dr. Berger entered the cable television industry in 1971 as a founder, officer, director, and stockholder in Calvert (Tr. 599). In 1978, he became President of Calvert (Tr. 601) and ran the company's day-to-day affairs (Tr. 619). Dr. Berger was also active in Caltech of Baltimore City, an unsuccessful applicant for a Baltimore cable television franchise and ran the day-to-day affairs of Caltech as well (Tr. 619).

33. Dr. Berger met Lester Green, one of the original principals in Fenwick L. P., at the public hearings in connection with the Baltimore cable franchise (Tr. 616-17). Dr. Berger met Al Stewart, another original principal in Fenwick L. P., through Dr. Elijah Saunders (Tr. 617). Dr. Berger and Dr. Saunders are "life-long" friends (Tr. 643). They met at age 15, and were college roommates and later classmates in medical school (Tr. 643).

34. Dr. Berger believed that the Baltimore City Council recommended or required that minorities own a 25 percent ownership interest in applicants for the cable franchise (Tr. 616-18). Dr. Berger brought in Mr. Stewart and Mr. Green, who are minorities, as co-venturers in the application for the cable franchise and believed that his application then met or exceeded the City's guidelines (Tr. 616-18). Dr. Berger also placed Dr. Saunders on the board of Caltech and loaned money to Dr. Saunders to buy stock in Caltech (Tr. 622-23).

35. Dr. Berger describes himself as a friend and advisor to Dr. Saunders and Mr. Green (Tr. 642). Dr. Berger strongly recommended Dr. Saunders for the position of Vice President of the University of Maryland Hospital, a position which Dr. Saunders now holds (Tr. 643, 798). Dr. Berger speaks with Dr. Saunders frequently (Tr. 643).

36. Dr. Berger testified that he brought together Ms. Lyon, Dr. Saunders, Mr. Stewart, Mr. Green and himself as an applicant group for Fenwick L. P. because he wanted to "do something" for these people (Tr. 622-23).

37. Mr. Robert Levine, who represented Dr. Berger in his cable television business, periodically contacted Dr. Berger with information about window openings (Tr. 637). Dr. Berger testified that approximately two months prior to the tendering of Fenwick L. P.'s application, Mr. Levine informed him of the window opening for a new radio station in Fenwick Island (Tr. 638-39). Mr. Levine also explained to Dr. Berger the nature of minority preferences in the comparative hearing process (Tr. 639). Dr. Berger then informed Ms. Lyon, Dr. Saunders, Al Stewart and Lester Green about the Fenwick Island opportunity (*Id.*).

38. Prior to the filing of the application, Dr. Berger and the principals agreed that Dr. Berger was to hold an 80 percent interest in Fenwick L. P. as a limited partner (Tr. 640). The remaining 20 percent was to be held by the other principals as shareholders in a corporate general partner (*Id.*).

39. Dr. Berger was present at the initial meetings where the division of the 20 percent was diseussed (Tr. 641). All the principals in Fenwick L. P. were represented at these meetings by Mr. Levine; the principals did not retain separate counsel (Tr. 753-54, 804). Ms. Lyon and Dr. Saunders testified that they were aware that Mr. Levine also served as counsel to Dr. Berger in other matters (Tr. 750-51, 804-5). 40. Mr. Levine drafted the limited partnership agreement (Tr. 753-54). The limited partnership

agreement gives the limited partner. Dr. Berger, the right to object to transactions of the partnership within thirty days after the decision to make those transactions (Tr. 654). For example, the limited partner may object to programming contracts purchased by the station (Tr. 655). The limited partner may also raise objections to the station's method of advertising and its advertising rates (Tr. 656-57).

40. Dr. Berger testified that the limited partnership agreement gave him the right to object to the partnership's employment decisions (Tr. 662). Dr. Berger also had the power unilaterally to amend the limited partnership agreement (Tr. 668). Dr. Berger believes that nothing in the limited partnership agreement prevented his communicating with Ms. Lyon about the affairs of the partnership (Tr. 670).

41. Dr. Berger retained the engineer for Fenwick L. P. (Tr. 674-75). He did not confer with the other principals about this decision, nor did he apprise them of the financial arrangement arrived at with the engineer (Tr. 677-79). Dr. Berger retained the engineer after the time that the principals agreed that he was to be a limited partner[2] (Tr. 673-74).

42. The engineer sent Dr. Berger a diagram of an appropriate site for the station (Tr. 672). Dr. Berger contacted a real estate agent to find a site (*Id.*). Dr. Berger then purchased an option on a transmitter site for Fenwick L. P. and agreed to make the site available to the partnership (Tr. 672). This is the same site specified in Dr. Berger's application for Ocean Pines, Maryland (Tr. 671).

43. Dr. Berger testified that he would own the site in the event the application was granted (Tr. 686). Dr. Berger also testified that, while he "hopes" the partnership will pay him something for the site, he would not "take away" the site in the event they are unable to reimburse him for the cost (Tr. 686-87).

44. The costs required to purchase the site option and the anticipated cost of exercising that option were above and beyond Dr. Berger's 80 percent contribution to the partnership (Tr. 686).

45. Dr. Saunders testified that, to date, he has not contributed any funds to the applicant for expenses (Tr. 806). According to the minutes of the organizational meeting of the Board of Directors of Fenwick L. P.'s corporate general partner, Dr. Saunders was obligated to contribute110 as payment for 110 shares of stock (FIC Exh. 6. pgs. 5. 6). Ms. Lyon was obligated to contribute490 for 490 shares of stock (*Id.* p. 3). Mr. Green was obligated to contribute200 for 200 shares of stock (*Id.* p. 4), and Mr. Stewart was obligated to contribute200 for 200 shares of stock (*Id.* p. 5).

46. Subsequent to the filing of Fenwick L. P.'s application, Mr. Green was indicted on May 19, 1987, and convicted on September 4, 1987, on charges of making false claims and statements to the Federal government (Key Exh. 11, p. 2), and Mr. Stewart was indicted and pleaded guilty to criminal charges of one count of felony theft in the Baltimore City Circuit Court, Baltimore, Maryland (Fenwick L. P. Exh. p. 1). Mr. Green and Mr. Stewart resigned from the partnership after their respective convictions (Fenwick L. P. Exh. 1, p. 2).

47. After the B cut-off date, Dr. Berger resigned from the limited partnership on April 2, 1987 after deciding to apply for an FM station in Ocean Pines, Maryland (Tr. 626, 688-69). The 1mV/m contours of the proposed stations at Ocean Pines and Fenwick Island overlap (*MO & O*, FCC 87M-3020, released November 23, 1987, para. 3). Dr. Berger then assigned his limited partnership interest in Fenwick L. P. to Ms. Lyon in exchange for 10.00 (Fenwick L. P. Exh. 7, p. 10; Tr. 690) because Dr. Berger's attorney, Robert Levine, advised him that he could not maintain interests in both stations under the Commission's Rules (Tr. 626).

48. Dr. Berger was divorced in 1976 or 1977 (Tr. 598). This was his only marriage. For the past seven years, he has maintained a close personal relationship with Sharon Lyon (Tr. 605, 609, 710). Ms. Lyon is 35 years old (Fenwick L. P. Exh. 2, p. 1). Dr. Berger is 54 years old (Tr. 595).

49. Dr. Berger first met Ms. Lyon on a trip to Florida in 1980 or 1981, when he went out with her on a blind date (Tr. 602). They shared a residence in Florida for six to twelve months in 1980 or 1981 (Tr. 608-09).

50. Ms. Lyon was later hired by Calvert Telecommunications Corporation (Calvert), Dr. Berger's cable television company, in 1980 or 1981 as Director of Advertising Sales (Tr. 599, 610). Dr. Berger sold his interests in Calvert in September 1983; the sale was finalized in February, 1984 (Tr. 610). Dr. Berger then set up permanent residence in Ocean City, Maryland in 1984 (Tr. 611).

51. Ms. Lyon continued to work for the new owners of Calvert for a number of months (Tr. 611; Fenwick L. P. Exh. 2, pgs. 1, 2). Late in 1984, she resigned from this position and moved to Florida to work for a regional cable marketing company (Fenwick L. P. Exh. 2, p. 2).

52. In February, 1985, Ms. Lyon moved to Ocean City and was hired by the Sheraton Fontainebleau Inn & Spa (Sheraton) (Tr. 611; Fenwick L. P. Exh. 2, p. 2), which is controlled and owned by Dr. Berger (Tr. 612, 743). (Dr. Berger is President and controlling stockholder of the corporate general partner which controls the Sheraton (Fenwick L. P. Exh. 7, p. 1).

53. When Ms. Lyon moved to Ocean City to work for the Sheraton, she resided temporarily with Dr. Berger (Tr. 612). She currently resides in a condominium/townhouse owned by Dr. Berger (Tr. 610, 742).

54. Ms. Lyon is from a family of average means (Tr. 711). During their relationship, Dr. Berger has given Ms. Lyon monetary gifts when she was in need of money (Tr. 683, 730-31). Dr. Berger has also given her non-monetary gifts on many occasions (Tr. 731, 733-34, 736). Ms Lyon testified that, on at least several occasions, these non-monetary gifts have been worth more than 6,000 (Tr. 731). [3]

55. Dr. Berger invests in many limited partnerships (Tr. 650) and considers himself to be a wealthy man (Tr. 684).

56. Dr. Berger testified that he has given advice to Ms. Lyon in the past about the Fenwick L. P. application and will continue to do so (Tr. 644, 695).

57. Ms. Lyon testified that she "hinted" to Dr. Berger that she deserved a6,000 bonus (Tr. 745-46). At the time, Ms. Lyon was aware that the Commission's hearing fee was6,000 (Tr. 746). Dr. Berger responded with a6,000 gift in July, 1987 (Tr. 682-83). The hearing fee assessed by the Commission in this case was due on July 22, 1987. *See Hearing Designation Order*, DA 87-746, released July 1, 1987 at para. 19. Dr. Berger made this 6,000 gift after the date of his resignation from the limited partnership (Tr. 682).

58. At the time Dr. Berger gave Ms. Lyon6,000, he was cognizant of the Commission's6,000 hearing fee requirement (Tr. 685). Dr. Berger had been informed of the Commission's hearing fee by Mr. Levine in connection with Dr. Berger's application for the Ocean Pines station (*Id.*).

59. Dr. Berger is uncertain whether he has made other gifts to Ms. Lyon during the time in which the Fenwick L. P. application has been pending before the Commission (Tr. 684). Dr. Berger testified, however, that for many years he has given Ms. Lyon cash gifts when she needed money (*Id.*). Dr. Berger described the6,000 as a "small amount" for what he has given Ms. Lyon through the years (Tr. 694). Dr. Berger further testified that, if Ms. Lyon approached him today for money he would probably give her the money again (Tr. 688).

60. Dr. Berger was advised by Mr. Levine that, pursuant to the Commission's Rules, he could not continue as a limited partner in Fenwick L. P. and prosecute an application for Ocean Pines, Maryland (Tr. 626). Accordingly, Dr. Berger withdrew from Fenwick L. P. on April 2, 1987 (Tr. 626, 688-89).

61. When Dr. Berger withdrew from Fenwick L. P., he sold his limited partner interest to Ms. Lyon for10.00 and "other considerations" (Tr. 694). Dr. Berger described the "other considerations" as his "right to apply for another license" (Tr. 694). Dr. Berger also believed this was fair because he was "leaving the partnership on its own" (Tr. 691).

62. That same month, Ocean Pines LPB Broadcasting Corp., a company 100 percent owned by Dr. Berger, filed an application for a new FM station in Ocean Pines, Maryland.

STANDARD COMPARATIVE ISSUES

Key Broadcasting Corporation

63. The ownership structure of Key Broadcasting Corporation is as follows:[4] (Key Exh. 1).

D. Ridgely Bolgiano	President/Director	7.23 percent
Carl G. Brenner	Executive Vice President/Director	23.38 percent
Patricia Brenner (Joint Tenant w/ Carol G. Brenner)	------	-----
Melis R. Erlbeck	Secretary/ Vice President/ Director	4.94 percent
L. Paul Bolgiano, Jr. & Sarah Bolgiano (Joint Tenants)		11.69 percent
L. Paul Bolgiano, Jr.	Director	6.31 percent
Edgar A. Parks	Director	4.19 percent
John P. Hull	Vice President	.92 percent
Samuel E. Parks	------	4.21 percent
Adeline M. Roche	------	6.27 percent
Trust U/W.S. Elmer Parks, H. Anthony Mueller, Trustee	------	16.83 percent
Equitable Trust Co., Trustee U/D George J. Roche	------	14.03 percent
Donald Fletcher	Treasurer	-0-
Jacqueline Parks	Assistant Secretary	-0-

64. Key is a Maryland corporation. It is the licensee of AM Broadcast Station WBMD, Baltimore, Maryland and FM Broadcast Station WQSR, Catonsville, Maryland. The shareholders of Key own all of the stock of Southern Maryland Broadcasting Corporation, the licensee of AM Broadcast Station WPTX and FM Broadcast Station WMDM, Lexington Park, Maryland. Each shareholder of Key holds the same percentage of stock in Southern Maryland as he or she holds in Key. Furthermore, the officers and directors of Southern Maryland are identical to the officers and directors of Key Broadcasting. Key has an application on file for an MDS authorization at Baltimore, Maryland (Key Exh. 2, pg. 1).

65. D. Ridgely Bolgiano, president, director and 7.23 percent shareholder of Key and Southern Maryland is treasurer, director and 6.38 percent shareholder of Drexel Hill Associates, Inc., the licensee of AM Broadcast Station WMTR, Morristown, New Jersey, and FM Broadcast Station WDHA-FM, Dover, New Jersey, and an applicant for an MDS authorization at New York City, New York (Key Exh. 2, pg. 1).

66. Key proposes auxiliary power (Key Exh. 3, pg. 1). The parties to this proceeding have stipulated the engineering, agreeing that there are no significant differences in the engineering coverage of the applicants (Key Exh. 4, pgs. 1, 3).

Fenwick Island Broadcast Limited Partnership I

67. Fenwick L.P. is a limited partnership organized under the laws of Maryland (Fenwick L.P. Exh. 1, pg. 1). Fenwick L.P.'s limited partnership agreement was executed on July 11, 1985; its certificate of limited partnership was filed with the Maryland Department of Assessments and Taxation on July 16, 1985 (*Id.*).

68. The original partners of Fenwick L.P. were as follows:

Name	Interest	Equity
Fenwick Island Broadcast	General Partner	20 Percent Corporation
Leonard P. Berger, M.D.	Limited Partner	80 Percent

(*Id.*).

69. Fenwick Island Broadcast Corporation, the general partner in Fenwick L.P., is a Maryland corporation with one class of stock (*Id.*). The Articles of Incorporation for Fenwick L.P. were filed with and approved by the Maryland Department of Assessment and Taxation on July 11, 1985 (*Id.*).

70. As of July 11, 1985, the following shares of stock were issued and outstanding:

Name	No. Shares	Equity
Sharon V. Lyon	490	49 Percent
Lester L. Green	200	20 Percent
Alfred J. Stewart	200	20 Percent
Elijah Saunders, M.D.	110	11 Percent

(*Id.*).

71. As of July 11, 1985, the above shareholders held the following positions in FIBC: Ms. Lyon was President and Director; Mr. Green was Vice President, Treasurer and Director; Mr. Stewart was Secretary and Director; and Dr. Saunders was Vice President and Director (*Id.*).

72. On April 2, 1987, Mr. Stewart resigned as an officer and director of FIBC and assigned his 20 percent in the corporation to Mr. Green and Ms. Lyon in equal shares (Fenwick L.P. Exh. 1, pg. 2).

73. On April 2, 1987, Dr. Berger assigned his 80 percent limited partnership interest to Ms. Lyon (Fenwick L.P. Exh. 1, pg. 1). This assignment occurred after the deadline for amendments as of right in this proceeding, formerly known as the "B" cut-off date.[5] Mr. Green and Mr. Stewart also withdrew from the partnership after this date (Fenwick L.P. Exh. 1, pg. 1).

74. On August 31, 1987, Mr. Green resigned as an officer and director of FIBC and assigned his 30 percent in the corporation to Ms. Lyon (*Id.*). The present ownership structure of FIBC is as follows:

Name	No. Shares	Equity
Sharon V. Lyon	890	89 Percent
Elijah Saunders, M.D.	110	11 Percent
Dora Korell	0	0 Percent

(*Id.*).

75. Ms. Lyon pledges to resign from her current position at the Sheraton and work full time as General Manager (at least 40 hours per week) at Fenwick L.P.'s proposed station (Fenwick L.P. Exh. 2, pgs. 2, 3).

76. As General Manager, Ms. Lyon will oversee the activities of all station departments, establish operating and advertising policies, and supervise the day-to-day affairs of the station (*Id.*).

77. Dr. Saunders testified that he will work part time at the proposed station (at least 20 hours per week) as Director of Public Service and Public Affairs Broadcasting (Fenwick L.P. Exh. 3, pg. 3). In this capacity, Dr. Saunders will have management responsibility for ascertainment of community needs and interests and for development of non-entertainment programming reflecting these needs (*Id.*).

78. Dr. Saunders is currently employed as Associate Professor of Medicine, Head of the Division of Hypertension and Clinical Director of the Hypertension Center at the University of Maryland School of Medicine (*Id.* pg. 2). He also serves as Clinical Associate Professor at Mehary Medical College in Nashville, Tennessee (*Id.*). Dr. Saunders is also Vice President of the University of Maryland Hospital (Tr. 798).

79. During the past year, Dr. Saunders traveled as much as six days per month (Tr. 797-98).

80. In connection with his position at Mehary, Dr. Berger travels to Nashville and gives a lecture once or twice a year (Tr. 799).

81. To date, Dr. Saunders has not been highly involved in the prosecution of Fenwick L.P.'s application (Tr. 810).

82. Dr. Saunders testified that he believed the hearing fee was 1,000 and that Dr. Berger paid800 towards this fee in his capacity as a limited partner (Tr. 808).

83. A typical work day for Dr. Saunders consists of early morning meetings, attending to patients, and preparing lectures (Tr. 789). Dr. Saunders' days begin at 7:30 a.m. and ends at 6:00 p.m. (Tr. 798-99). He often brings work home in the evenings (*Id.*). Dr. Saunders described his schedule as a "full day" (Tr. 799).

84. Dora Korell is not an FIBC stockholder. She became an FIBC director following Lester Green's conviction. She is employed as a furniture salesperson (Tr. 766-67). She is a friend of Ms. Lyon and Dr. Berger (Tr. 766, 781, 787). Ms. Korell has sold furniture to the Sheraton (Tr. 785).

Local Residence

85. Ms. Lyon lived in Ocean City, Maryland, between February, 1985 and April, 1986 (Fenwick L.P. Exh. 2, pg. 3). Since April, 1986, she has resided in Fenwick Island, Delaware (*Id.*).

86. Dr. Saunders is a "lifetime" resident of the Baltimore, Maryland area (Fenwick L.P. Exh. p. 1). Dr. Saunders maintains a summer home in Ocean Pines, Maryland and resides at this home approximately one month per year (*Id.* 3). He has maintained his Ocean Pines summer home since approximately 1974 (*Id.*). Dr. Saunders' Ocean Pines residence is within the city-grade contours of the proposed station (*Id.*).

Civic Participation

87. Dr. Saunders is an accomplished cardiologist (Fenwick L.P. Exh. 3, pgs. 1-3). He is a fellow at the American College of Cardiology; author of publications on hypertension; lecturer on cardiological problems, particularly as they related to Blacks; President of the Association of Black Cardiologists; Founder of the Urban Cardiology Research Center; Past President of the American Heart Association, Maryland Affiliate; Past Chairman of the Maryland High Blood Pressure Coordinating Council; and former Commissioner of the Maryland Hypertension Committee (*Id.*). In Ocean Pines, Maryland, Dr. Saunders is a member of the Borderlinks Condominium Association (*Id.*).

Broadcast Experience

88. Between 1974 and 1976, Dr. Saunders was producer and host of a radio talk show on heart disease for an AM station in Baltimore, Maryland (Fenwick L.P. Exh. 3, pg. 2). On this program, sponsored by the American Heart Association, Dr. Saunders directed interviews with various professionals on many aspects of heart disease (*Id.*).

89. Dr. Saunders has also co-hosted a number of radio and TV programs throughout the country on heart disease and hypertension (*Id.*). Dr. Saunders writes a column for the *Baltimore Sun*, Health Magazine section twice each month (*Id.* pg. 3).

Auxiliary Power Proposal

90. Fenwick L.P. plans to install auxiliary power generating equipment at the studio and transmitter sites to facilitate broadcasting during interruptions of power (Fenwick L.P. Exh. 5, pg. 1).

Diversification of Media Ownership

91. Neither Fenwick L.P. nor its General Partner, FIBC, has any ownership interest in any media of mass communication. Sharon V. Lyon, controlling stockholder of Fenwick Island Broadcasting Corporation and sole limited partner of Fenwick L.P., owns a minor limited partnership interest in Jones Cable TV Fund 12 (Fenwick L.P. Exh. 4). Dr. Saunders served on the Board of Directors of Calvert Telecommunications Corporation from its inception until 1984, when the system was sold (Fenwick L.P. Ex. 3, pg. 3). Dr. Saunders continues to serve on the advisory board of the successor company (*Id.*). Dr. Saunders also served on the board of directors of Caltech Cablevision of Baltimore City, an unsuccessful applicant for a Baltimore Cable franchise (*Id.*).

92. Fenwick L.P. did not introduce evidence about the media interests of Dr. Berger and Mr. Stewart, apparently because they have withdrawn from the partnership. Dr. Berger is chairman of Comcast Cablevision. Alfred J. Stewart is the General Manager of non-commercial education FM station WEAA-FM, Baltimore, Maryland. (Fenwick L.P. application filed July 12, 1985, Exhs, 2, 3).

Fenwick Island Communications, Inc.

93. FIC, a Delaware Corporation, has one class of common voting stock and three shareholders: W. Lawrence Patrick (40 percent); James C. Church (40 percent; and Lawrence G. Lewis (20 percent). All three individuals are directors. Mr. Patrick is President and Secretary. Mr. Church is Treasurer and Board Chairman. Mr. Lewis is Vice President (FIC Exh. 1). (Mr. Lewis replaced his wife, Ester S. Lewis, who was killed in an auto accident in June, 1986, (Tr. 122).

Integration

94. FIC claims credit for the full-time (at least 40 hours per week) integration of its 40 percent shareholder, Mr. Patrick, who is proposed as General Manager. In this capacity, he will be responsible for the station's management and for supervision of all station employees. He will be fully involved in the day-to-day operation of the proposed facility (FIC Exh. 2, pg. 2).

95. Since March 1986, Mr. Patrick has served as president and chairman of the board of directors of Sterling Communications Corporation (Sterling) with headquarters in Columbia, Maryland. Sterling was organized by Mr. Patrick and some investors, primarily venture capitalists, with the purpose of acquiring and operating broadcast properties (Tr. 138, 142). Sterling is the licensee of five radio stations. As the chief operating officer of Sterling, Mr. Patrick is responsible for the management and operation of the stations and for the supervision of all of Sterling's 85 employees (FIC Exh. 2, p. 3). Mr. Patrick's work includes supervising the day-to-day operations of all of the Sterling stations (Tr. 139). Mr. Patrick's duties frequently require him to travel (Tr. 139). Mr. Patrick spends one or two days every six to eight weeks in each of Sterling's broadcast markets (Tr. 141). Mr. Patrick has a written employment contract with Sterling (Tr. 152). Sterling may acquire additional broadcast properties, and is regularly involved in discussions concerning station acquisitions (Tr. 144, 155).

96. From February 15, 1984 to the present, Mr. Patrick has served as an independent broadcast consultant, under the firm name Patrick Communications, supervising from two to six employees (FIC Exh. 2, pg. 4). Since September, 1979, Mr. Patrick has served as Adjunct Assistant Professor at the University of Maryland, College Park, Maryland, teaching broadcast management, programming and law in the College of Journalism and Department of Radio-TV-Film (FIC Exh. 2, pgs. 4, 5). Mr. Patrick has an employment contract with the University of Maryland, although the University is late in renewing the term of the contract. (Tr. 138, 156). Mr. Patrick has held other teaching positions at the University of Tulsa, Ohio University, and the University of Tennessee (*Id.*, p. 5). Mr. Patrick held positions in the news and public affairs departments of several stations during the early 1970's (*Id.*, p. 5).

97. FIC's two other shareholders, Messrs. Church and Lewis, propose to work part time at the proposed station, *i.e.*, not fewer than 20 hours per week (FIC Exhs. 3, 4). As the proposed Sales Manager Mr. Church would supervise the sales staff and maintain contacts with advertisers (FIC Exh. 3, pg. 2). Mr. Lewis would serve as Station Manager under Mr. Patrick and would supervise the station's public affairs efforts and ensure its responsiveness to the listening audience (FIC Exh. 4, pg. 1).

98. Messrs. Church and Lewis are currently employed on a full-time basis, although each has pledged to reduce such commitments in order to fulfill his integration commitment (FIC Exh. 3, pg. 1; Exh. 4, pg. 2). At the present time, Mr. Church, a realtor, works approximately 40 hours per week (Tr. 126).

Local Residence

99. Two of FIC's three shareholders--Messrs. Church and Lewis-- maintain their permanent residences within the service area (*i.e.*, within the 1 mVm contour) of FIC's proposed station. Mr. Patrick maintains a summer residence within the proposed service area, and will relocate to the service area on a permanent basis in the event that FIC's application is granted.

100. Mr. Patrick's summer residence is located at 13510-C Holly Lane, which is approximately ten blocks from the city limits of Fenwick Island (FIC Exh. 2, pg. 2). He purchased the home in July, 1983, and since that time, his immediate family has spent the summer months (Memorial Day through Labor Day) at the home. During the summer months, Mr. Patrick spends weekends and his summer vacations at the residence (FIC Exh. 2, pgs. 2, 3). In the event that FIC's application is granted, he will establish his primary and permanent residence within the service area of FIC's proposed station (FIC Exh. 2, pg. 3).

Civic Participation

101. Mr. Church maintains his primary, full-time residence in Ocean City, Maryland, within the service area of FIC's proposed station (FIC Exh. 3, pg. 1). He as resided continuously within the service area of FIC's proposed station for 28 years, and plans to maintain his residence within the service area of FIC's proposed station (FIC Exh. 3, pg. 1).

102. For nine years, from July, 1978 to June, 1987, Mr. Lewis was a full-time resident of Ocean City, Maryland. During this time, he resided at 8901 Rusty Anchor Road in Ocean City, Maryland, which is located within the service area of FIC's proposed station (FIC Exh. 4, pgs. 2, 3). In June, 1987, Mr. Lewis returned to his employment with the State Department and established a temporary residence in Annapolis, Maryland (FIC Exh. 4, pg. 1). He maintains his Ocean City residence, however, and will return to the residence on a permanent, full-time basis in the event that FIC's application is granted (FIC Exh. 4, pg. 1).

103. Mr. Church as served on the Worcester County Board of Education since 1982; he is currently President of the Board of Education. On July 1, 1982, he was appointed by the Governor of the State of Maryland to serve as a member of the Board of Education. On July 1, 1987, he was appointed by the Governor to serve a second five-year term on the Board of Education. In July, 1983, Mr. Church was elected vice president of the County

Board of Education and served as Vice President until July 1984. In July, 1984, he was elected to his current position as President (FIC Exh. 3, pg. 2).

104. Since 1960, Mr. Church has been a member of the Order of Demolay, a fraternal organization that undertakes community service activities in the Ocean City area (FIC Exh. 3, pg. 2). Since 1960, Mr. Church has been a member of the Atlantic Methodist Church in Ocean City, Maryland (FIC Exh. 3, pg. 2). From September, 1975 to September, 1977, Mr. Church has served as Assistant Cub Master for Boy Scout Troop 261 in Ocean City, Maryland (FIC Exh. 3, pg. 2). From June, 1973 to June, 1974, Mr. Church served as Fund Drive Chairman for the American Red Cross Chapter in Worcester County, Maryland (FIC Exh. 3, pg. 3). From June, 1973 to June 1976, Mr. Church served as Treasurer and a member of the Board of Directors of the Worcester County Red Cross (FIC Exh. 3, pg. 3).

105. From May, 1975 to May 1976, Mr. Church served as president of the Ocean City Elementary School PTA (FIC Exh. 3, pg. 3). Since January, 1962, Mr. Church served as a charter member of the Ocean City Chapter of the Jaycees (FIC Exh. 3, pg. 3). In April, 1976, Mr. Church served as Team Captain for the fundraising drive for the Peninsula General Hospital in Ocean City, Maryland (FIC Exh. 3 pg. 3). From November, 1971 to November 1973, Mr. Church served as a member and director of the Hotel-Motel Restaurant Association of Ocean City (FIC Exh. 3, pg. 3).

106. From 1963 to 1982, Mr. Church was a member of the Ocean City Lions Club. He served as Chairman of the Scholarship Committee from July, 1978 to July, 1979 and as Program Chairman from July, 1980 to July 1981. As Chairman of the Scholarship Committee, Mr. Church reviewed student requests for scholarships and helped to decide which student would receive a Lion's Club scholarship. As Program Chairman, he arranged for speakers and set up other club programs and activities (FIC Exh. 3, pg. 4).

107. Mr. Church has been a member of the Ocean City Chamber of Commerce since September, 1978 (FIC Exh. 3, pg. 4). Mr. Church as been involved in the Ocean City Recreation Council as a member and an officer. The Recreation Council provides programs, facilities, and funds for the youth of Ocean City and the surrounding areas. Mr. Church served two terms as president of the Ocean City Recreation Council, from September, 1977 to September 1979, and two terms as vice president, from September 1975 to September 1977 (FIC Exh. 3, pg. 4, 5).

108. Mr. Church has been a member of the Ocean City Convention and Visitors Bureau sine January 1976. He served as a member and president of the Board of Directors of this organization from October, 1980 to October, 1982; he is still an active member (FIC Exh. 3, pg. 5).

109. Mr. Church has been involved in a number of political campaigns in the Ocean City area, as a fundraiser and active campaigner. Specifically, in October, 1985, he was Campaign Chairman for Harry Kelley's election to serve as mayor of Ocean City. After Mayor Kelley's death in October, 1986, he served as Co-Campaign Chairman for the special election campaign of Mayor Kelley's successor, Mayor Roland Powell, the current mayor of Ocean City. In 1987, he served as Co-Campaign Chairman during the election of James S. Hall to the City Council of Ocean City, Maryland. Mr. Church is also Campaign Chairman for Mark Pilchard, who serves as a Maryland State Delegate, representing Worcester, Somerset and Wicomico Counties (FIC Exh. 3, pg. 3, 4).

110. Since April, 1982, Mr. Lewis has been a member of the American Legion Post in Berlin, Maryland, which is within the service area of FIC's proposed station. Since May, 1982, he has been a member of the Union Baptist Church, which is also within the service area of FIC's proposed station. Mr. Lewis was also involved as a campaign volunteer in 1981 and 1985 in the Ocean City mayoral election campaigns of Harry Kelley (FIC Exh. 4, pg. 2).

Broadcast Experience

111. Mr. Patrick claims credit for his broadcast management experience. He holds a Doctorate in Communications and Management from Ohio University and other graduate and postgraduate degrees. He has served as a broadcast consultant and has taught courses at various universities, including the University of Maryland where he is presently an Adjunct Assistant Professor.

112. Mr. Patrick has worked in production and supervisory capacities at various broadcasting stations and served as Senior Vice President of the National Association of Broadcasters. Since March 1986, in addition to operating Patrick Communications, a consulting firm at Silver Spring, Maryland, Mr. Patrick has been affiliated with Sterling Communications Corporation (Sterling). He is founder, President an Chairman of the Board of Sterling (FIC Exh. 2, pgs. 2-6; Tr. 138). Sterling, headquartered in Columbia, Maryland, currently is the licensee of five broadcast stations. Mr. Patrick has ultimate responsibility for the management and operation of these stations and he supervises 85 employees (FIC Exh. 2, pg. 3).

113. For two years, from late 1983 through 1985, Mr. Patrick was an officer having supervisory duties at Gilmore Broadcasting Co., a company with multiple broadcast multi-media ownership interests (*Id.* pgs. 3, 4). Mr. Patrick will reduce the time commitments to his professional and other activities in order to fulfill his full time integration commitment to FIC if FIC's application is granted (*Id.* pg. 2; Tr. 157). Mr. Patrick testified that he would reduce his involvement in specific duties, travel and titles (Tr. 156-57). The Sterling Board was aware that Mr. Patrick was proposing a full time commitment in the Fenwick Island application before the Sterling employment contract was signed (Tr. 153). He also stated that he would discontinue his part time teaching activities (Tr. 137-38).

Auxiliary Power

114. FIC will install and maintain auxiliary power generators at both its transmitter/tower and main studio locations of sufficient capacity to power the transmitter and all studio facilities (FIC Exh. 5 at pg. 1).

Diversification

115. FIC does not own any interest in any medium of mass communication. Mr. Church and Mr. Lewis do not own any mass media interests. Mr. Patrick is president and chairman of the board of directors of Sterling which is the licensee of WSSL(AM)/WSSL-FM, Greenville-Gray Court, South Carolina; WKJN-FM, Hammond, Louisiana; and WJDX(AM)/WMSI-FM, Jackson, Mississippi (FIC Exh. 2, pg. 1; Tr. 138).

116. Mr. Patrick is also a minority shareholder in Sterling. Sterling has five classes of stock, including two classes of common stock (voting and nonvoting), two classes of Convertible Preferred Stock (voting and nonvoting), and one class of nonvoting Senior Preferred Stock. Mr. Patrick owns six percent of the issued and outstanding equity of Sterling, which represents 28 percent of Sterling's voting stock (FIC Exh. 2, pg. 1).[6]

Gloria J. Fernandez - Pereyo Merryman

117. Ms. Merryman, 33 and a college graduate, has applied as a sole proprietor. Ms. Merryman is an Hispanic female (Merryman Exh. 1, pgs. 1, 2). She was raised in Puerto Rico and she attended primary and secondary schools there.

118. After receiving a degree from the Weber College in Babson Park, Florida, Ms. Merryman held a number of secretarial/office managerial positions in Puerto Rico. She moved to Baltimore, Maryland in 1976. After temporary employment as a secretary, she joined the secretarial staff of the First National Bank of Maryland, International Department. She was promoted to International Administration Officer where she was responsible for the Bank's Latin American Group. Due to her fluency in Spanish (the primary language spoken in her childhood home), her loan administration duties included contacts with Latin American banking clients and some foreign travel. Ms. Merryman left the bank in 1981 and became a sales associate for a resort furniture operation at Bethany Beach, Delaware. Thereafter, she became a bookkeeper for her employer's resort condominium and home rental business. She served in that capacity until 1984 (Merryman Exh. 1, pgs. 2-4). Her husband is a real estate broker (Tr. 835).

Integration

119. If the Merryman application is granted, Ms. Merryman will devote at least 40 hours per week (full time) to the station as its General Manager (Merryman Exh. 1, pgs. 1, 2). As General Manager, she will have exclusive control of the day-to-day operations of the station. She will make all decisions regarding management, station policy, programming, production, technical operations, finances, employment, advertising and promotion, and community relations. She will also be responsible for implementing and overseeing the station's EEO policy (Merryman Exh. 1, pg. 2).

Local Residence

120. Ms. Merryman has resided in Bethany Beach, Delaware since 1981. Bethany Beach is located within the primary service contour (the 1 mv/M contour) of Merryman's proposed FM station at Fenwick Island, Delaware (*Id.* pg. 2).

Auxiliary Power

121. If Merryman is the successful applicant in this proceeding, she will install auxiliary power generators in order to ensure continuous operation in the event of a power outage (Merryman Exh. 1, pg. 4).

Diversification

122. Ms. Merryman has no present or potential ownership interest in any other medium of mass communication (Merryman Exh. 1, pg. 1).

CONCLUSIONS OF LAW

Site Availability Issue - Key

123. The record reflects that Mr. Sydney Bloom was retained by Key through its counsel to locate a suitable transmitter site. In searching for the site he was assisted by a real estate agent, Mr. Phillips. Mr. Bloom discovered a suitable, available lot in an industrial park. He contacted the owners' agent, Jerry Todd, and received a prospectus offering the lots in the park for sale. He communicated the appropriate information to Key's consulting engineer and wrote a letter to Key's principal Carl Brenner confirming that he had ascertained that Lot 15 was available at a price of50.000. Key relied upon that letter when he certified the availability of the site in Key's application.

124. At the hearing, Jerry Todd confirmed that Lot 15 was always available for sale and that, while the price has gone up to 75,000, the lot remains available to Key today. Moreover, while Mr. Todd had earlier submitted an affidavit in which he stated that he did not recall speaking to Mr. Bloom, he conceded on the witness stand that he may indeed have had a conversation with Mr. Bloom which he does not now recall. Mr. Bloom, for his part, recalls speaking to Mr. Todd and Mr. Bloom's testimony is supported by the numerous documents which he produced, including his travel notes, Mr. Todd's business card, the prospectus and telephone bills.

125. In light of the foregoing, it is concluded that Key's transmitter site has at all times been available and that there was no misrepresentation in connection with the certification of the availability of the site.

Lottery Issue - Key

126. In an effort to promote the cleanliness and environmental integrity of the Chesapeake Bay, Carl Brenner in 1986 designed a contest wherein a boat was stocked with cans of Miller Beer and participants in the contest paid 1.00 for the privilege of guessing the number of cans of beer in the boat. All of the proceeds of the contest were donated to "The Save the Bay Foundation," an environmental group dedicated to the preservation of the Bay. Mr. Brenner considered the contest to be a game of skill and not a lottery. Subsequently, however, the FCC instituted an investigation looking to determine whether the promotion of the contest violated the Commission's Rules against the broadcasting of lottery information. Ultimately, on May 5, 1987, the Commission informed Key by letter that it had determined the contest to be a lottery and admonished Key for broadcasting information relating to a lottery. The matter was made a part of Key's WQSR(FM) permanent record. The letter did not impose any administrative sanctions against Key.

127. The pertinent question is whether Key violated Section 1.65 by failing to report the existence of the reprimand letter in this proceeding. Section 1.65 requires the reporting of matters of decisional significance. Key has not claimed any integration credit in this proceeding. In light of the fact that no credit for integration has been sought, the reprimand letter is not of any decisional significance. It is concluded that there was no violation of Section 1.65 of the Rules in Key's not reporting the receipt of the reprimand letter. Furthermore, there is no evidence that Carl Brenner was ever under the impression that the reprimand letter was of decisional significance to this proceeding.

Failure to Report (Sec. 1. 65) Issue -- Fenwick Island Broadcast Limited Partnership I

128. Lester Green was indicted on felony charges on May 19, 1987. Ms. Lyon did not learn of this development until mid-June, 1987. However, no report was made to the Commission until September 1987 when Fenwick L.P. reported that Mr. Green had been convicted at which time it was also reported that Mr. Green had resigned from the corporation as director and stockholder. Mr. Green had been convicted on September 4, 1987, of two counts of violating 18 U.S.C. §1001 and one count of violating 18 U.S.C. §287. Ms. Lyon had testified that attempts were made to learn the nature of Mr. Green's indictment, but were met with "stonewalling" by Mr. Green and his personal attorney. Neither would reveal the nature of the pending criminal charges.

129. Pending criminal charges are, of course, reportable under Section 1.65. The application Form 301 specifically asks for such information. However, the failure by Fenwick L.P. to report timely Mr. Green's indictment is not of decisional significance. No party in this proceeding was prejudiced by Fenwick L.P.'s failure to report the indictment. Had Fenwick L.P. reported it timely, the mere pendency of the criminal proceeding would not have given rise to any Commission action.

130. In *Phoenix Media Corp.*, 2 FCC Rcd 498 (1987), the Commission affirmed that, under the new policy statement on *Character Qualifications*, a reporting deficiency would be relevant only if it were disqualifying, and that an applicant would not be disqualified for a reporting failure absent an intent to deceive. Here there is no evidence that Fenwick L.P. intended to deceive. In fact, as seen above, Fenwick L.P. voluntarily reported Mr. Green's conviction.

131. In light of the foregoing the Section 1.65 issue against Fenwick L.P. IS RESOLVED in its favor.

Misconduct Issue -- Fenwick Island Broadcast Limited Partnership I

132. Two of the original four stockholders, officers and directors of Fenwick L. P., Alfred J. Stewart and Lester L. Green, who together held 40 percent of the voting stock, subsequently resigned as officers and directors and assigned their stock interests because of his felony indictment and convictions.

133. Mr. Stewart was convicted on a guilty plea of felony theft on March 10, 1987. Shortly after his conviction, Mr. Stewart was asked to resign. Fenwick L.P. reported to the Commission his resignation on April 8, 1987. Mr. Green was indicted on charges of felony violations of U.S. Criminal Code Sections 287 and 1001 on May 19, 1987 and convicted of those charges on September 4, 1987. 18 U.S.C. §287 and §1001 make felonies acts which constitute willful false or fraudulent statements to the U.S. Government or an agency thereof. In addition, Mr. Green was convicted of aiding and abetting in violation of 18 U.S.C. §2 for inducing others to violate a Federal criminal statute. Mr. Green resigned as director and stockholder on August 31, 1987 (before conviction) and this was reported on September 17, 1987.

134. Assuming for the moment that the gravity of Messrs. Stewart and Green's offenses would warrant disqualification in light of the Commission guidelines as set out in *Policy Regarding Character Qualifications*, 102 FCC 2d 1179, 1190-91 (1986), the question is whether the withdrawal of Messrs. Stewart and Green as directors and stockholders obviated the need to consider their conduct at all.

135. In its statement *Policy Regarding Character Qualifications*, *supra*, note 91 at 1217, the Commission stated that corporate misconduct often can be cured by replacing management and directors. Removal of corporate principals have been authorized in the past to remove concerns over disqualification. *See* , *Rockland Broadcasting Co.*, 43 FCC 738 (Rev. Bd. 1963); *Kannapolis Television Co.*, FCC 88-148, released May 9, 1988.

136. In the instant case none of the illegal activities cited above involved any of the other principals of Fenwick L.P. In fact, none of the other principals were aware of the these activities which gave rise to indictment and conviction. None of these proscribed activities benefited Fenwick L.P. in any way. Furthermore, neither Mr. Stewart or Mr. Green were controlling stockholders, both having a combined interest of 40 percent in Fenwick Island Broadcast Corp. Because of their respective withdrawals neither will have any involvement or influence of Fenwick Island Broadcast Corp. or the operation of the proposed radio station.

137. In light of the foregoing, it must be concluded that the conduct of Mr. Stewart and Mr. Green which gave rise to their respective indictments and convictions will have no bearing on the future management of Fenwick Island Broadcast Corp. in its operation of the proposed station. The misconduct issue IS RESOLVED in Fenwick L.P.'s favor.

Real Party - In - Interest and Inconsistent Application Issues -- Fenwick Island Broadcast Limited Partnership I

138. The test for determining whether a third person is a real party-in-interest is "whether that person has an ownership interest, or will be in a position to control, actually or potentially, the operation of the station." *San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7008 (1987); *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983).

139. Dr. Berger held the 80 percent limited partnership interest in Fenwick L.P. from the time of the partnership's inception, until April 2, 1987, when that partnership interest was assigned to Sharon Lyon. The issue is whether during that time he was in a position to control the operation of the proposed station, and whether he continues in such a position of control notwithstanding the assignment of his partnership interest.

140. Dr. Berger has had strong interest in the communications field as early as 1971, when he became the founder, officer, director and stockholder in Calvert Telecommunications (Calvert). In 1978, he became President of Calvert and ran the company's day-to-day active in Caltech Cablevision of Baltimore City (Caltech), an unsuccessful applicant for a Baltimore cable television franchise, and ran the day-to-day affairs as well. Dr. Berger brought into Caltech as co-venturers Stewart and Green, believing that the Baltimore City Council recommended or required that minorities own a 25 percent interest in applicants for the cable franchise. Also joining Dr. Berger was a life long friend, Dr. Saunders. Dr. Berger loaned money to Dr. Saunders to buy stock in Caltech. Dr. Berger described himself as a friend and advisor to Dr. Saunders and Mr Green.

141. Dr. Berger brought together Ms. Lyon, Dr. Saunders, Mr. Stewart, Mr. Green and himself as an applicant group because he wanted to do something for these people. Dr. Berger learned of the Fenwick Island allocation opening from his attorney, Mr. Robert Levine, who had periodically contacted him with information about window openings. Mr. Levine also explained to Dr. Berger the nature of minority preferences in the comparative hearing process.

142. Prior to the filing of the application, Dr. Berger and the other principals agreed that Dr. Berger was to hold an 80 percent interest in Fenwick L.P. as a limited partner. Dr. Berger then contacted an engineer and later purchased an option for site.

143. Dr. Berger made contributions to the partnership when requested to do so. Although partnership expenses were to be divided on a *pro rata* basis, Dr. Saunders could not recall making any capital contributions to the venture.

144. Dr. Berger has attended meetings of the general partner Fenwick Island Broadcast Corp. and was kept informed of all partnership activities. He testified that he had given advice concerning the application and would continue to do so in the future.

145. Under the terms of the limited partnership agreement, Dr. Berger held rights to object to any partnership transaction appearing on the financial statements, such as programming contract purchased by the station. Dr. Berger also had the power to amend the limited partnership agreement, to object to station advertising and to object to the partnership's employment decisions.

146. The record also shows that Dr. Berger and Ms. Lyon have maintained a close personal relationship during the past seven years. Dr. Berger has provided Ms. Lyon with Jobs, housing and substantial gifts of money and jewelry. There is no evidence in the record that this close relationship ended when Dr. Berger withdrew from the partnership. In fact upon withdrawing from Fenwick L.P. he assigned his 80 percent to Ms. Lyon for 10.00.

147. All of the foregoing leads to the conclusion that, despite the general partner's claimed exclusive authority to operate and manage the partnership and despite Dr. Berger's status as a limited partner, it was Dr. Berger alone who has been the life blood of Fenwick L.P.'s entire proposal. In April of 1987, Dr. Berger decided to apply for a frequency in Ocean Pines, Maryland, and upon counsel's advice, withdrew from Fenwick L.P. But there is no evidence indicating that Dr. Berger has extricated himself from his position of control in relation to this application nor that his interest will not continue through Ms. Lyon in the future. On the contrary, the record indicates that even after his withdrawal from Fenwick L.P., Dr. Berger has continued to be involved with the activities and decisions made by the partnership. He has provided Ms. Lyon with the6.000 hearing fee in order that Fenwick L.P. could continue in this proceeding. He has stated his willingness to continue to provide funds to Ms. Lyon for use in this proceeding. He owns the option to purchase Fenwick L.P. transmitter site. Even the third director of FIBC is a friend and business associate of both Ms. Lyon and Dr. Berger. There can be no doubt that Dr. Berger potentially and even now controls the operation of Fenwick L.P. There is ample proof that Ms. Lyon and Dr. Saunders are too beholden to Dr. Berger to be considered independent of his control. It must be concluded that Dr. Berger is the real party-in-interest.

148. Although a Section 73.3518 has been specified, its consideration in this proceeding is not appropriate. The issue was added on the strength of Dr. Berger's application filed for a frequency in Ocean Pines, Maryland. However, the Ocean Pines application was filed after the application for Fenwick Island was filed. If either of these two applications are inconsistent, it would have to be the Ocean Pines application and not the Fenwick Island application. The Section 73.3518 issue has to be and IS RESOLVED in Fenwick L.P.'s favor.

COMPARATIVE CRITERIA

Key Broadcasting Corporation

Diversification

149. Key warrants a substantial diversification demerit for its attributable interests in four radio stations, all of which are located in the State of Maryland. *See, N. E. O. Broadcasting Company*, 60 RR 2d 125, 130 (Rev. Bd. 1986); *see*, also *Phoenix Media Corp.*, 62 RR 2d 123, 127 (1987).

Integration

150. Key does not claim integration credit in this proceeding.

Auxiliary Power

151. Key has proposed auxiliary power generators.

Fenwick Island Broadcast Limited Partnership I

Diversification

152. Fenwick L.P. is assessed a slight diversification demerit for the broadcast and cable connections of three of its principals--Dr. Berger, Dr. Saunders and Mr. Stewart. Dr. Berger and Mr. Stewart withdrew from the partnership after the "B" cut-off date and consequently their media holdings are relevant. Mr. Stewart is the general manager of a non-commercial educational FM station (WEAA-FM) in Baltimore, Maryland. Such managerial roles are cognizable under the diversification criterion. (*See , San Joaquin Television Improvement Corporation*, 54 RR 2d 1206, 1209-10 (Rev. Bd. 1983).

153. Dr. Berger's position as chairman of the Baltimore County, Maryland cable television system and Dr. Saunders' role as a member of the Comcast Advisory Board, which advises the County Television Franchise, are decisionally significant. Commission precedent holds that cable television interests are cognizable interests for diversification purposes in comparative FM hearing proceedings. *See, Payne Communications Inc.*, 61 RR 2d 1323, 1340-41 (Rev. Bd. 1986).

Integration

154. As noted above, although Dr. Berger has withdrawn from the partnership, his withdrawal occurred after the "B" cut-off date and his actions as limited partner prior to his withdrawal are relevant to the comparative evaluation. The findings indicate that Dr. Berger played an impermissible active role in the operations of the partnership prior to his withdrawal and that because of his

close personal ties to the other Fenwick L.P. principals he would be in the future in a position to exert influence on policy making.

155. Additionally, Fenwick L.P.'s limited partnership agreement did not contain any of the provisions for insulating Fenwick L.P.'s limited partner from management of the partnership that the Commission set forth in *Ownership and Attribution*, 58 RR 2d 604, 613-20 (Rev. Bd. 1986), which established standards for assessing the role played by a limited partner. *See, Chester Associates*, 60 RR 2d 362 (Rev. Bd. 1985).

156. A limited partnership agreement must contain the requisite insulating provisions to entitle the general partner to 100 percent integration credit. *Dayton Broadcasting Co. Inc.*, 60 RR 2d 1199, 1202 (1986). Dr. Berger testified that there were no such provisions. Moreover, he stated that he had given advice to the principals in connection with Fenwick L.P. and would feel free to do so in the future. Moreover, as has been described, there are several provisions by which Dr. Berger could have injected himself directly into the partnership's day-to-day affairs, such as objecting to partnership transaction, refusing to consent to the retention of certain agents or unilaterally amending the agreement.

157. In light of the foregoing, no weight may be given to Fenwick L.P. limited partnership agreement. Dr. Berger must be considered to be an active investor and not as a passive one. In effect, based on the findings made above. the Fenwick L.P. application is held to be a sham proposal. Fenwick L.P. is not entitled to any integration credit. However, if the Fenwick L.P. application were to be considered *bona fide*, Dr. Berger's equity interest would have to be factored into the evaluation of integration credits and, since he is not proposed for day-to-day management, no integration credit can be attributed to his 80 percent equity interest. Nor could any integration credit be allowed for Dr. Saunders' participation. Dr. Saunders is an accomplished cardiologist with a myriad of weekly responsibilities of at least 55 hours per week of regular working hours. Dr. Saunders also brings work home with him frequently and is often out of town presenting lectures–approximately six days per month. Dr. Saunders' proposal to work at the proposed Fenwick L.P. station at least 20 hours per week strains credulity. First, he has not pledged to reduce any of his current workload. And, second, Dr. Saunders has not pledged to move from Baltimore to Ocean City and describes himself as a "life-long" resident of Baltimore. If Dr. Saunders is in some way to fulfill this requirement, he would need to travel nearly two hours between Baltimore and Ocean City on a regular basis, thereby adding to the high hourly commitment of his current position, combined with his proposed commitment to Fenwick L.P.'s proposed station. And, Dr. Saunders' total lack of involvement in FIBC makes it altogether more doubtful that he will make the extraordinary effort which would be required for him to effectuate his integration commitment. Dr. Saunders' failure to pledge to resign from his current full-time position requires the rejection of his proposal. *Kennebec Valley Television, Inc.*, 62 RR 2d 877, 880-82 (Rev. Bd. 1987) Moreover, Dr. Saunders proposes at a minimum a 75 hour work week plus travel between Baltimore and Dr. Saunders' lectures and work at home. The combination of this schedule may well be in excess of 100 hours per week. The Review Board has rejected implausible hourly commitments in the past. *See, Caldwell Broadcast Corp.*, 57 RR 2d 1039, 1046 (Rev. Bd. 1985), *rev. denied*, FCC 86-245, released May 15, 1986 (proposals in excess of 80 hours will not be credited); *Berryville Broadcasting Co.*, 44 RR 2d 1325, 1337-38 (Rev. Bd. 1978) (rejecting a 70 hour work week).

158. It follows then that Fenwick L.P. must be eliminated or at best only is entitled to be credited with Ms. Lyon's participation. Her equity interest at the "B" cut-off date was 10.20 percent. It has been held that the better practice is to award no decisive comparative credit for flawed ownership proposals (*Susan S. Mulkey*, 3 FCC Rcd 590, 591 (Rev. Bd. 1988).

Local Residence

159. Ms. Lyon's full-time integration proposal, if credited, would be slightly enhanced by her residing in the proposed service area since February 1985.

Minority and Female Ownership

160. Were Fenwick L.P.'s proposal creditable, it would be entitled to an enhancement for Ms. Lyon's female status (10.20 percent ownership interest). Dr. Saunders minority status (2 percent ownership interest) is not credited because it has been concluded that his integration proposal is not credible.

Broadcast Experience

161. Only Dr. Saunders has had broadcast experience. No credit, however, could be given because it has been concluded that Dr. Saunders' integration proposal has been discounted.

Auxiliary Power

162. Fenwick L.P. has proposed auxiliary power generators.

Fenwick Island Communications, Inc.

Diversification

163. Mr. Patrick owns 28 percent of the voting stock (6 percent equity) of Sterling Communications Corporation. Additionally, he is the president and chairman of the board. Sterling is the licensee of five commercial broadcast stations. In light of this, FIC is assessed a slight to moderate diversification demerit.

Integration

164. FIC is entitled to a 40 percent full-time integration credit for the proposed participation of Mr. Patrick. Mr. Patrick made a timely promise to reduce his present duties so as to enable a full-time involvement in Fenwick Island. His promise to reduce present activities is consonant with his employment contract with Sterling.

165. FIC is also entitled to a 60 percent part-time integration credit for the proposed integration of Mr. Church (40 percent equity interest) and of Mr. Lewis (20 percent equity interest).

Local Residence

166. Mr. Church's and Mr. Lewis' proposals are enhanced by their extended residence in Ocean City for the past 28 years and 9 years, respectively. A slight enhance-

ment inures to Mr. Patrick's proposal for his recreational residence in the proposed service area since 1983. *Mark L. Wodlinger*, 101 FCC 2d 762, 772-73 (Rev. Bd. 1985).

Minority Ownership

167. Mr. Lewis, FIC's 20 percent shareholder, is Black. Accordingly, FIC is entitled to slight enhancement for minority ownership. *See, Horne Industries, Inc.*, 98 FCC 2d 601 (1984).

Civic Participation

168. Both Mr. Church's and Mr. Lewis' proposals will be credited with an enhancement for civic participation.

Broadcast Experience

169. Mr. Patrick's experience in broadcast management is considerable and FIC is entitled to a substantial preference based on Mr. Patrick's 40 percent ownership interest.

Auxiliary Power

170. FIC has proposed auxiliary power generators.

Gloria J. Fernandez - Pereyo Merryman

Diversification

171. Ms. Merryman owns no other mass media interests. Accordingly, she is entitled to a substantial preference under the diversification criterion. *See, Pillar of Fire*, 99 FCC 2d 1256, 1276-78 (Rev. Bd.).

Integration

172. Merryman is entitled to a 100 percent full-time integration credit for Ms. Merryman's proposed participation. Her proposal is enhanced by her local past residence, minority and female status. The Merryman proposal also receives a preference for auxiliary power.

ULTIMATE CONCLUSIONS

173. Key has not proposed any integration of its principals into day-to-day management. At best, Fenwick L.P. only may be credited with Ms. Lyon's integration proposal. Her ownership interest at the "B" cut-off date was 10.20 percent. Consequently, the Key and Fenwick L.P. applications are eliminated. The integration differences between each of them and FIC and Merryman is more than 12 l/2 percent, an amount which has been ruled to be a "clear quantitative difference." *See , New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981).

174. For the same reason the FIC application is eliminated. It has been credited with a 40 percent full-time integration and 60 percent part-time integration, whereas Merryman has been credited with a 100 percent full-time integration. Even if FIC were not eliminated on the basis of the rationale enunciated in *New Continental Broadcasting, supra*, it would lose on the basis of the comparative criteria. It is concluded that Merryman best serves the public interest and its application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Gloria J. Fernandez-Pereyo Merryman (File No. BPH-850712ZI) for a construction Permit for a new FM station in Fenwick Island, Delaware IS GRANTED, and the applications of Key Broadcasting Corporation (File No. BPH-850709MK); Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a Fenwick Island Broadcast Limited Partnership I (File No. BPH-850712ZD); and Fenwick Island Communications, Inc. (File No. BPH-850712ZE) ARE DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] The application of Maranatha Broadcasting Co., Inc. (File No. BPH-850712GP) was returned by the FM Branch as unacceptable for filing on April 8, 1987; the application of The Johns Hopkins Broadcasting Foundation, Inc. (File No. BPH-850712ZC) was dismissed by the *Hearing Designation Order*, DA 87-746, released July 1, 1987; the applications of Barbara B. Benns (File No. BPH-850710NG), Silver Rocket Broadcasting, L.P. (File No. BPH-850712ZA), Eastern Shore Broadcasting Corp. (File No. BPH-850712ZF) and Leigh Sandoz Leverrier (File No. BPH-850712ZG) were dismissed by *Order*, FCC 87M-1993, released August 24, 1987; the application of Ethel L. Crouse (File No. BPH-850712YZ) was dismissed by *Order*, FCC 87M-2747, released November 13, 1987; the application of Vacation Radio, Inc. was dismissed by *Order*, FCC 88M-263, released February 3, 1988; and the application of Seashore Broadcasting Company was dismissed by *Order*, FCC 88M-1063, released April 12, 1988.

[2] Dr. Berger did testify after considerable questioning that he did discuss with Ms. Lyon the need to hire an engineer and to find a site (Tr. 677).

[3] Ms. Lyon was unable even to estimate the total value or amount of Dr. Berger's gifts to her over the last seven years (Tr. 728-36).

[4] *See*, Petition for Leave to Amend, filed by Key on March 10, 1988, correcting the ownership information given for Key. Specifically, John P. Hull was originally listed as a director, but is actually a vice president of the company. Additionally, Jacqueline Parks was added to the list as assistant secretary. The amendment was accepted by *Order*, FCC 88M-867, released March 29, 1988.

[5] On August 20, 1985, the Commission released a Public Notice announcing that it had accepted Fenwick L.P.'s application for tender. Public Notice, Report No. 123439, released August 20, 1985, page 8. Therefore, Fenwick L.P.'s deadline for filing amendments as of right was 30 days after that date, on September 19, 1985. *See* 47 C.F.R. Sections 73.3522(a)(6), 1.4.

[6] In April, 1986, Mr. Patrick held 32.65 percent of the voting stock of Sterling, which represented five precent of the issued and outstanding equity of the company. His voting stock interest in Sterling was subsequently diluted to its present level by the sale of stock to an additional investor in the company (FIC Exh. 2, pgs. 1, 2).

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ALDEN COMMUNICATIONS CORP. Green Valley, Arizona	**MM DOCKET NO. 83-720** File No. BPCT-830311KF
SUNGILT CORPORATION, INC. Green Valley, Arizona	**MM DOCKET NO. 83-721** File No. BPCT-830311KN

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1988; Released: November 15, 1988

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. On September 22, 1988, Alden Communications Corp. filed a "Petition for Reconsideration" of the *Supplemental Decision*, 3 FCC Rcd 5047 (Rev. Bd. 1988), which granted the application of Sungilt Corporation, Inc. for a construction permit for a new television station at Green Valley, Arizona and denied the mutually exclusive Alden application. Sungilt opposed the reconsideration request on October 5, 1988. For the following reasons, we deny Alden's petition for reconsideration.

2. In its petition, Alden first argues that the *Supplemental Decision* did not address its supplemental exception that "unfulfilled pre-conditions to the [site] lease effectively make [Sungilt's proposed] site unav[a]ilable." Alden Petition at 3. We reject this contention because Alden's petition fails to particularize what those "pre-conditions" are and does not allege that Sungilt will be unable to meet them. *See* 47 CFR §1.106(d)(2) (requirement of "particularity). Instead, Alden merely references the "pre-conditions" argument set forth in paragraphs 7-9 of its Supplemental Exceptions, which point out that prior to actual use of the site Sungilt will have to secure the following items from the State of Arizona governmental authorities:

> (a) a right-of-way permit from the Land Department for access and for electrical power lines; and
>
> (b) clearances from the Game and Fish Department, the State Museum, and the Commission of Agriculture and Horticulture.

The need for such permit and clearances, of course, constitutes no legally cognizable basis for finding Sungilt's site not available or unsuitable. For this is essentially a governmental zoning matter and, as Alden itself recognizes, the Commission has long held that:

> When an applicant who has obtained reasonable assurance from the land owner must also obtain a zoning change or equivalent further approval by a governmental authority in order to use the site for broadcast transmission, it nevertheless need not demonstrate such actual approval to the Commission; zoning-type approval is assumed absent indications that it is unlikely to occur. *See San Francisco Wireless Talking Machine Co., Inc.*, 47 RR 2d 889, 893 (1980) (citing *Eastside Broadcasting, Co.*, [45 FCC 1202 (Rev. Bd. 1963)], and *Chronicle Publishing Co.*, 45 FCC 1545, 3 RR 2d 529 (Rev. Bd. 1964). However, neither *San Francisco Wireless* nor any other case of which we are aware permits an applicant proposing to locate its transmitter on *government-owned* land to avoid the 'reasonable assurance' legal standard by 'assumption' of negotiation approval as if the issue were solely one of zoning . . .

Alden Supp. Exceptions at 7 (quoting *Alden Communications Corp. (Board Remand Order)*, 102 FCC 2d 518, 520 (Rev. Bd. 1985)). The record here contains no "indications" that the zoning-type approvals are unlikely to occur. And, the Commission has further determined in this proceeding that Sungilt has adequately proven that its proposed site on government land is reasonably available to it. *Alden Communications Corp. (Order on Review)*, 3 FCC Rcd 3937 (1988).

3. Second, Alden states that the Board erred in not adding an abuse of process issue against Sungilt, but then further states that "it is unnecessary to add an issue . . . . All the Commission needs do is to consider the abuse, insofar as it bears upon reliability." Alden Petition at 3. We deny reconsideration of this point because it was fully addressed in the *Supplemental Decision* at paras. 2-4. Alden offers no additional facts and does not press its position with any substantive discussion. As we recently reiterated:

> It is well-settled that reconsideration will not be granted merely to reargue matters previously considered and resolved. *See WWIZ, Inc.*, 37 FCC 685 (1984), *aff'd sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

Religious Broadcasting Network, FCC 88R-58, released October 26, 1988, at para. 2.

4. Finally, Alden asserts that the "abuse of process" matter considered by the ALJ should have served to reduce Sungilt's 100% integration credit to 0%. Alden Petition at 3-4 (citing *Focus Television Co.*, 98 FCC 2d 546 (Rev. Bd. 1984)). However, as we explained in the *Supplemental Decision* at paras. 2-3, the ALJ, the one Commission official most familiar with the matters raised by Alden, fully considered the situation; and, exercising his plenary authority over the proceeding pursuant to 47 CFR §1.243, he determined that no sanctions against Sungilt were warranted. Essentially, the ALJ found that Sungilt's transgressions arose from the adversarial exuberance of its former counsel and counsel's tardiness in responding to certain discovery requests.

5. Nothing here is analogous to *Focus Television*, relied upon by Alden, where the Board assigned a substantial character demerit to an applicant for a recently adjudicated pattern of fraudulent conduct by its key principal, ultimately finding comparatively superior a competing applicant. No such pattern of fraudulent conduct, seriously undercutting the applicant's character traits of truthfulness and reliability, is present here. Indeed, the character defects addressed in *Focus Television* were so pronounced that the Commission later modified the Board Decision and disqualified the subject applicant. *Kannapolis Television Co.*, 1 FCC Rcd 1037 (1986), *modified and settled*, 3 FCC Rcd 2676 (1988). *See generally, Character Policy Statement*, 102 FCC 2d 1179, 1209-1211 (1986); *Policies and Rules Relating to Broadcast Renewal Applicants*, 3 FCC Rcd 5179, 5199 n.2 (1988) (redefining "abuse of process"); *Silver Star Communications-Albany, Inc.*, FCC 88R-60, released November 2, 1988, at paras. 41, 50, 60.

6. Moreover, in *Silver Star, id.* at para. 44, we recently deferred to an ALJ's determination that an applicant, "with its sorry performance during discovery, abused the Commission's hearing process by failing to respond fully to the Bureau's discovery requests and to the presiding officer's order compelling answers to interrogatories. These failures, however, were not so egregious as to require . . . disqualification." *Id. (Initial Decision)*, 3 FCC Rcd 1958, 1972 (ALJ 1988). And the Commission has recently declared that "character considerations should be excluded from comparative analysis," *Character Policy Statement*, 102 FCC 2d at 1230, the only relevant determination being whether or not an applicant is basically qualified to be a licensee. *Id.* at 1232.

7. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed on September 22, 1988 by Alden Communications Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WRKO) Boston, Massachusetts	**MM DOCKET NO. 84-1057** File No. BR-953
For Renewal of License	
THE COMMONWEALTH BROADCAST GROUP Boston, Massachusetts *et al.*	**MM DOCKET NOS. 84-1058 to 1059, 84-1061, 84-1063 to 1065**
For Construction Permit for a new AM Station	
RKO GENERAL, INC. (WROR-FM) Boston, Massachusetts	**MM DOCKET NO. 84-1070** File No. BRH-617
For Renewal of License	
SOUTH JERSEY RADIO, INC. Boston, Massachusetts *et al.*	**MM DOCKET NOS. 84-1072, 84-1076 to 1078, 84-1080 to 1081 and 84-1083 to 1084**
For Construction Permit for a new FM Station	
THE COMMONWEALTH BROADCAST GROUP Assignor	
and	File No. BAL-880712HE
ATLANTIC VENTURES OF BOSTON, L.P.	
For Consent to Assignment of License for WRKO	
PROFESSIONAL COMMUNICATIONS PARTNERS Assignor	
and	File No. BALH-880712HF
ATLANTIC VENTURES OF BOSTON, L.P. Assignee	
For Consent to Assignment of License for WROR-FM	
File Nos. BLH-870609KD, BL-870602AH and Related Applications	

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1988; Released: November 14, 1988

By the Commission: Commissioner Dennis dissenting and issuing statement.

1. Before the Commission are: (1) Joint Petition for Approval of Settlement Agreement and Related Relief filed July 12, 1988 by RKO General, Inc. (RKO); Professional Communications Partners, a Limited Partnership (ProCom), The Commonwealth Broadcast Group (Commonwealth), Boston Radio Group, Inc. (BRG), Nash Communications Corporation (Nash), COZZIN Communications Corporation (COZZIN), Fort Hill Radio Associates (Fort Hill), Boston Radio Corporation (BRC), Radio Broadcasters Limited Partnership (Radio Broadcasters), South Jersey Radio, Inc. (South Jersey) and Atlantic Ventures of Boston, L.P. (Atlantic);[1] and (2) Comments filed July 21, 1988 by the Mass Media Bureau.

2. In their Joint Petition the parties propose to settle this comparative renewal proceeding. The main features of the proposed settlement are: (1) RKO's renewal applications for stations WRKO and WROR-FM would be dismissed; (2) the mutually exclusive applications of BRC, BRG, Radio Broadcasters, Fort Hill, Nash, South Jersey, and COZZIN would be dismissed; (3) ProCom's mutually exclusive application for WROR-FM and Commonwealth's mutually exclusive application for WRKO would be granted; (4) Commonwealth would assign the license for WRKO, and ProCom would assign the license for WROR-FM, to Atlantic; and (5) Atlantic would acquire the physical and other assets of WRKO and WROR-FM from RKO. Under the agreement Atlantic would pay RKO27,740,000 of which a total of10,240,000 would be used to pay the other applicants, leaving RKO with a net payment of17,500,000.[2]

3. The parties contend that their settlement would serve the public interest by avoiding further burdensome litigation in this case and by helping to resolve the protracted and complex set of interrelated proceedings involving 14 RKO-owned stations, including WRKO and WROR-FM. RKO's basic and comparative qualifications have been at issue in this series of proceedings for more than 23 years. [3] The parties also contend that approval of the agreement will put WRKO/WROR-FM into the hands of an unarguably qualified licensee that would not suffer the same uncertainties as to its future as RKO does. The parties have submitted affidavits stating that they filed their applications in good faith and not for the purpose of reaching or carrying out a settlement agreement. The Bureau interposed no objections to approval of the settlement.

4. We have fully considered and approved a settlement agreement similar to the instant one in the KHJ-TV, Los Angeles, California proceeding (Docket Nos. 16679-80). *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988). We there concluded that strong public interest considerations favor settling what has become one of the most protracted and burdensome proceedings in the Commission's history. Although the circumstances in this case are

not identical to those in the Los Angeles proceeding, we believe that essentially the same public interest considerations govern both proceedings. That is, we continue to believe that the public interest is better served in this case by ending this uniquely protracted litigation – which threatens to continue for many years to come – so that RKO can withdraw as a licensee and an unquestionably qualified licensee, able to devote its full resources to broadcasting, can take over the ownership of the stations and operate them without a cloud of uncertainty hanging over its head. We also note that approving the settlement would preserve our policy of deterring licensee misconduct. RKO would not receive full compensation for the license. Under the terms of the settlement agreement, RKO would receive only 63 percent of the proceeds of the sale.[4] Further, RKO has already suffered the loss of WNAC-TV in Boston, now worth more than400 million. In addition, RKO must either withdraw entirely from broadcasting or risk the loss of its remaining stations if the Commission finds it unqualified in Phase I of the KHJ-TV proceeding. Consistent with our disposition of the KHJ-TV agreement, therefore, and for the reasons stated more fully there and which we incorporate herein by reference, we hold that approving the agreement before us would serve the public interest. Similarly, we find that the agreement complies with 47 U.S.C. § 311(d) and 47 C.F.R. § 73.3525. We note, moreover, that in a pleading filed September 9, 1988, the Bureau states that it has reviewed the assignment application and finds that the proposed assignee is qualified.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Approval of Settlement Agreement and Related Relief filed June 9, 1987 IS DISMISSED as requested by the parties.

6. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement Agreement and Related Relief IS GRANTED and the associated Agreements ARE APPROVED.[5]

7. IT IS FURTHER ORDERED, That the following applications for renewal of license and for construction permits ARE DISMISSED with prejudice: RKO General, Inc. (File Nos. BR-953, BRH-617), Boston Radio Corporation (File Nos. BP-830512AA, BPH-830512CC), Boston Radio Group, Inc. (File Nos. BP-830512AX, BPH-830512DG), Radio Broadcasters Limited Partnership (File Nos. BP-830512BI, BPH-830512CN), Fort Hill Radio Associates (File No. BPH-830512BG), Nash Communications Corporation (File No. BPH-830512DB), South Jersey Radio, Inc. (File Nos. BP-830511AI, BPH-830511AJ), COZZIN Communications Corporation (File Nos. BP-830512BM, BPH-830512DG); and that the applications of The Commonwealth Broadcast Group (File Nos. BP-830510AC, BL-870602AH) and Professional Communications Partners (File Nos. BPH-830512CW, BLH-870609KD) for construction permits and for licenses to cover the construction permits ARE GRANTED; and that the applications for assignment of WRKO (File No. BAL-880712HE) and WROR-FM (File No. BALH-880712HF) ARE GRANTED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED and the Partial Initial Decision dealing with the qualifications of the various applicants for a construction permit (*RKO General, Inc. (WRKO)*, 60 RR 2d 1215 (I.D. 1986)) IS VACATED as moot.[6]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] This petition supersedes an earlier one filed June 9, 1987, which the parties now seek to withdraw.

[2] The payments to the other applicants would be distributed as follows:

ProCom	1,816,250
Commonwealth	1,816,250
BRC	1,030,500
BRG	1,030,500
Radio Broadcasters	1,030,500
Fort Hill	1,500,000
Nash	801,000
South Jersey	607,500
COZZIN	607,500

[3] A detailed history of these proceedings is set forth in *RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057 (1988).

[4] As in *KHJ - TV*, it is significant to our approval of the agreement that RKO is receiving significantly less than the 75 percent of fair market value that a licensee might receive for transfer of its license pursuant to a distress sale.

[5] As they have requested, the parties may consummate the mutually contingent transactions in a single closing. Our action shall be effective with respect to the termination of the parties' hearing rights upon their notifying us of closing under those transactions. As the Bureau suggests, this action is also contingent upon the promised severance, by Atlantic's principal, Eric B. Schultz, of his relationship with WBRU-FM.

[6] The parties request this relief, and it is customary practice. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950); *Boston Community Media Committee, Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975). As the parties recognize, this action does not affect those findings and conclusions concerning the qualifications of COZZIN which have been adopted by ALJs in other proceedings in which COZZIN is an applicant.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

IN RE: Joint Petition for Approval of Settlement Agreement and related matters in the Boston, Massachusetts radio comparative renewal proceeding MM Docket Nos. 84-1057 *et al.*

I respectfully dissent from the Commission's action for the reasons stated in my dissent in the Memorandum Opinion and Order in Docket No. 16679, RKO General, Inc. (KHJ-TV), 3 FCC Rcd 5057 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Adopted: October 28, 1988; Released: November 4, 1988

Mr. Thomas C. Harper	File Nos. X-1588,
President, Radio Officers Union	X-1589, X-1601
Suite 311, 100 Indiana Avenue, N.W.	through X-1614,
Washington, D.C. 20001	X-1628 through X-1633

Dear Mr. Harper:

The Commission has before it the question of whether The Radio Officers Union, District 3 of the National Marine Engineer's Beneficial Association (ROU) has solicited prohibited *ex parte* communications in the above-referenced proceeding and, if so, what action to take.[1] Based on the facts before us, as set forth below, we conclude that the ROU has willfully violated the Commission's *ex parte* rules, 47 C.F.R. §§ 1.1200-1.1216, by soliciting prohibited communications in this restricted proceeding. Accordingly, pursuant to section 503(b)(5) of the Communications Act of 1934, 47 U.S.C. § 503(b)(5), we are issuing this citation to the ROU for willful violation of the Commission's *ex parte* rules.[2]

This adjudicative proceeding became restricted upon the filing of the ROU's formal opposition on January 14, 1988. 47 C.F.R. § 1.1208(c). Accordingly, subsequent to that date, *ex parte* presentations and solicitations thereof were prohibited, unless exempted under section 1.1204(b) of the Commission's rules. *See* 47 C.F.R. §§ 1.1208, 1.1210. [3] Beginning with a letter dated February 1, 1988, Thomas C. Harper, President of the ROU, was sent copies of letters from the Managing Director to various Congressmen and Senators indicating that this proceeding was a "restricted" proceeding under the Commission's *ex parte* rules.

These letters referred to "the Commission's *ex parte* rules dealing with communications relative to restricted proceedings under consideration by the Commission," and referenced section 1.1212 (d) of the Commission's rules, which relates to "[p]rohibited" *ex parte* presentations. Whatever the ROU's interpretation of these letters, April 22 Letter at 4-6, upon their receipt, the ROU was on notice that this was a restricted proceeding, in which *ex parte* communications were prohibited.

Subsequent to its receipt of these letters, on February 23, 1988, the ROU admittedly sent letters to numerous mayors soliciting their opposition before the FCC to the exemption requests at issue in this proceeding and made available a Western Union hotline for their use. April 22 Letter at 3; March 23 Managing Director Letter, Attachment (February 23, 1988 Letter to Mayor Koch). Such solicitations constituted a clear violation of the Commission's *ex parte* rules. *See* 47 C.F.R. §§ 1.1208(a), 1.1210. The fact that the ROU may not have known that the *ex parte* rules applicable to restricted proceedings prohibit solicitations of *ex parte* communications from public officials, April 22 Letter at 4, does not excuse its violation of the rule prohibiting such solicitations or make its violation any less willful. *See, e.g., Charles R. Lutz*, 56 FCC 2d 385, 386 (1975) (admonishing licensee for soliciting impermissible *ex parte* communications despite the fact that the licensee was "not familiar with the pertinent rules" and did not intend to violate them); *Fay Neel Eggleston*, 1 FCC 2d 1006, 1007 (1965) (a violation need not be intentional to be willful).

Accordingly, pursuant to section 503(b)(5) of the Communications Act, 47 U.S.C. § 503(b)(5), this letter constitutes a citation that the ROU has violated the Commission's *ex parte* rules. Pursuant to section 503(b)(5), the ROU is entitled to a personal interview with an official of the Commission regarding its rule violation. Should the ROU wish to take advantage of such an opportunity, it should contact the Office of General Counsel, Administrative Law Division, at 632-6990. Should the ROU engage in future violations of the type described herein, it may be subject to forfeiture proceedings. 47 U.S.C. § 503(b)(5).

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Specifically, we have the following pleadings and letters before us: (1) a January 22, 1988 letter from Exxon Communications Company (Exxon); (2) a March 23, 1988 letter to your counsel from the Managing Director; (3) an Opposition and Reply to the January 22 Exxon letter filed by the ROU on March 25, 1988, accompanied by a Motion for Leave to File Late-Filed Opposition and Reply; (4) an Opposition to Motion of the Radio Officers Union for Leave to File Late-Filed Opposition and Reply, filed by Exxon on April 8, 1988; (5) an Opposition to Motion to File Late-Filed Pleading, filed by the American Institute of Merchant Shipping and Puerto Rico Marine Management, Inc. on April 8, 1988; (6) an April 22, 1988 letter from your counsel to the Managing Director; (7) an April 28, 1988 letter from Exxon to the Managing Director; and a May 6, 1988 letter from your counsel to the Managing Director.

[2] In its January 22 Letter, Exxon requested, *interalia*, that the ROU be required to show cause why its Opposition in this proceeding should not be summarily dismissed for violations of the *ex parte* rules. Because the Chief, Special Services Division, Private Radio Bureau, resolved the issues in the underlying proceeding adversely to the ROU, this request is now moot. *See Requests of 22 Large Oceangoing Cargo Ships for Exemption from Radio telegraph Requirements*, DA 88-972, released July 5, 1988.

[3] In addition, *ex parte* presentations by the ROU, and solicitations of *ex parte* presentations by the ROU, were prohibited prior to the filing of its formal opposition, beginning at whatever time it had an "inten[tion]" to file a formal opposition. 47 C.F.R. §§ 1.1208(b)(2), 1.1210. Given our finding that the ROU solicited impermissible *ex parte* communications after the filing of its formal opposition, we need not address here whether it committed any additional *ex parte* violations in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-527

In the Matter of

Amendment of the Amateur Service	RM-6274
Rules to Expand the 6 Meter	RM-6275
Repeater Subband.	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1988; Released: November 14, 1988

By the Commission:

I. INTRODUCTION

1. On December 14, 1987, The Southern California Six Meter Club (SCSMC) filed a rule making petition (RM-6274) seeking expansion of the current amateur service 6 meter repeater subband by 1 MHz. Section 97.7(f) of the Commission's Rules, 47 C.F.R. § 97.7(f), designates the frequencies 50-54 MHz as the 6 meter band, and Section 97.85(h) of the Commission's Rules, 47 C.F.R. § 97.85(h), in effect, authorizes repeater operation in the 52-54 MHz subband. SCSMC would expand the subband to 51-54 MHz because it believes that the growing number of amateur stations in repeater operation in the 6 meter band requires a larger repeater subband.

2. On December 23, 1987, The Southern California Repeater and Remote Base Association (SCRRBA) filed a rule making petition (RM-6275) also seeking expansion of the 6 meter repeater subband. Like the SCSMC, SCRRBA also requests expansion of the repeater subband to 51-54 MHz in order to accommodate a growing number of amateur stations in repeater operation in the 6 meter band.

3. Three timely comments supporting the proposed petitions were filed.[1] Glenn Thomas filed comments on both petitions and noted that an increase in the amount of spectrum available for repeater operation would improve the ability of amateur stations to engage in public service and emergency communications.[2] Mark A. Weiss commented on RM-6275 and stated that even though the number of channels would be increased, there would still be adequate space between 50.0-51.0 MHz for all other modes of narrow band communications. [3] The Los Angeles Repeater Association said that it supported the proposed repeater subband expansion because it believes that use of this additional amateur service spectrum for repeater communications represents the best possible spectrum ultilization.[4]

II. DISCUSSION

4. It appears that an expansion of the 6 meter repeater subband would provide for additional flexibility in the use of the 6 meter band. The amateur community could determine for itself the exact usage to which the 1 MHz of additional spectrum would be put. In urban areas, the 1 MHz could be utilized to make possible additional repeater operation. In less populated areas, where there may be no present need for additional repeater operations, the spectrum could continue to be available for other types of operation.

5. We note, however, that the 6 meter band utilization plan of The American Radio Relay League, Inc. (ARRL) recommends the segment 51.1-52.0 MHz be utilized for emission F3E simplex transmissions. Additionally, the segment 51.0-51.1 MHz is designated as a "Pacific DX Window," *i.e.*, a frequency segment in the 6 meter band where amateur operators in I.T.U. Regions 2 and 3 can intercommunicate during certain conditions of radio frequency propagation.[5] Although there appears to be a strong demand in the amateur community for the expansion of the 6 meter repeater subband, we are concerned with the effect the expansion would have on the other users of the segment 51.0-52.0 MHz. We therefore invite comments on the need for expansion of the 6 meter repeater subband and the impact of such expansion on existing users.

III. PROCEDURAL MATTERS

6. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

7. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its

face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

8. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c) and (r). Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested persons may file comments on or before **January 27, 1989,** and reply comments on or before **February 28, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided further than the fact of the Commission's reliance on such information is noted in the Report and Order.

9. In accordance with Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants must file an original and five copies of their comments and other materials. Participants who wish each Commissioner to have a personal copy of their comments should file an original and eleven copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Each set of comments must state on its face the proceeding to which it relates (PR Docket Number) and should be submitted to: The Secretary, Federal Communications Commission, Washington, D. C. 20554. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D. C.

10. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small business entities because these entities may not use the amateur radio service for commercial radio communication. *See* 47 C.F.R. § 97.3(b). Further, it is not expected that a new use of one megahertz of spectrum in a band already assigned to the amateur service would result in any significant increase in production of amateur equipment by manufacturers.

11. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

12. A copy of this Notice of Proposed Rule Making will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations would be amended as follows:

1. The authority citation for Part 97 would continue to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.85(h) would be revised to read as follows:

§ 97.85 Repeater operation.

* * * * *

(h) All amateur frequency bands above 29.5 MHz are available for repeater operation, except 50.0-51.0 MHz, 144.0-144.5 MHz, 145.5-146.0 MHz, 220.0-220.5 MHz, 431.0-433.0 MHz, and 435.0-438.0 MHz. Both the input (receiving) and output (transmitting) frequency of a station in repeater operation shall be frequencies available for repeater operation.

* * * * *

FOOTNOTES

[1] The petitions were listed in *PublicNotice*, Report No. 1712, February 19, 1988. Comments from interested parties were due on or before March 21, 1988. The reply comments of William R. Gardner were filed after the comment period closed. They will be associated with the docket and considered as comments to the Notice of Proposed Rule Making.

[2] Comments of Glenn Thomas at 1.

[3] Comments of Mark A. Weiss at 4.

[4] Comments of The Los Angeles Repeater Association at 2.

[5] *See The ARRL Repeater Directory*, 1988-1989 Edition, 25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC. (hereafter GBC) — File No. BPH-861215MI

SAR BROADCASTING, INC. (hereafter SAR) — File No. BPH-861216MB

BLEDSOE COMMUNICATIONS, LTD. (hereafter Bledsoe) — File No. BPH-861216MD

HEIDELBERG-STONE BROADCASTING COMPANY (hereafter Heidelberg) — File No. BPH-861217MA

MASTERPEACE MUSIC (hereafter Masterpeace) — File No. BPH-861217MD

MR. TONI E. PLUMMER (hereafter Plummer) — File No. BPH-861217MG

PHOENIX OF GOODLETTSVILLE, INC. (hereafter Phoenix) — File No. BPH-861217MI

H. RANDOLPH HOLDER, JR. AND BETTY C. HOLDER (hereafter Holder) — File No. BPH-861217MJ

DG ENTERPRISES, INC. (hereafter DG) — File No. BPH-861217ML

GOODLETTSVILLE COMMUNITY BROADCASTING, INC. (hereafter Community) — File No. BPH-861217MM

INNOVATIVE BROADCASTING, INC. (hereafter Innovative) — File No. BPH-861217MN

Rudy A. Lindsey, Sr. and Faye B. Lindsey, Husband and Wife, A Tenancy by the Entireties, d/b/a LINDSEY CHRISTIAN BROADCASTING COMPANY (hereafter Lindsey) — File No. BPH-861217M0

RADIO GOODLETTSVILLE, INC. (hereafter RGI) — File No. BPH-861217MP

WILLIAM E. BENNS, III (hereafter Benns) — File No. BPH-861217MQ

TENNESSEE WOMEN IN BROADCASTING, INC. (hereafter TWIB) — File No. BPH-861217MT

GERI TACZAK (hereafter Taczak) — File No. BPH-861217MV

HARTKE COMMUNICATIONS, CORP. (hereafter Hartke) — File No. BPH-861217MX

YOUNG BROADCASTING, INC. (hereafter Young) — File No. BPH-861217MZ

RICHARD S. FRANCIS (hereafter Francis) — File No. BPH-861217NA

GOODLETTSVILLE ASSOCIATES (hereafter Associates) — File No. BPH-861217NB

JOHN L. SINCLAIR (hereafter Sinclair) — File No. BPH-861217NC

TENNESSEE RADIO LIMITED PARTNERSHIP (hereafter Limited) — File No. BPH-861217NF

For Construction Permit for a New FM station on Channel 246C2 (97.1 MHz) in Goodlettsville, Tennessee

HEARING DESIGNATION ORDER

Adopted: September 30, 1988; Released: November 14, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* A preliminary examination of the applications has revealed that many of them are short-spaced to a proposal by station WSEK-FM to operate from Somerset, Kentucky, on Channel 246C2. *See* MM Docket No. 88-31. This short-spacing is the subject of a pending Rule Making proceeding. Nonetheless, the Goodlettsville applicants will be permitted to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of the Rule Making proceeding.

3. On May 9, 1988, Heidelberg filed petitions for reconsideration (petitions) against GBC, SAR, Phoenix, Holder, Lindsey, RGI, and Young. Heidelberg requests reconsideration of the staff's acceptance for filing of these applications premised on their alleged short-spacing to the buffer zone of station WRSA(FM), Decatur, Alabama. Related pleadings were filed.

4. Title 47 C.F.R § 1.106(a)(1) states that, except with respect to hearing designation actions adversely affecting a petitioner's participation in a hearing, petitions for reconsideration of interlocutory actions taken pursuant to delegated authority will not be entertained. *See also Son Broadcasting, Inc.*, 88 FCC 2d 635, 638 (1981). Accordingly, the petitions will be dismissed. However, we will consider the merits raised in the petitions by treating them as informal objections pursuant to 47 C.F.R § 73.3587.

5. Heidelberg argues that the noted applicants should not have been accepted for filing because they are short-spaced to the buffer zone of station WRSA(FM), Decatur, Alabama, and further, with the exception of GBC, SAR, and Phoenix, the applicants failed to request waiver of the spacing rules. The Commission's minimum distance separation requirements, 47 C.F.R. § 73.207(a), were modified in *Report and Order* in BC Docket No. 80-90, 48 Fed. Reg. 29,486 (June 27, 1983), *recon. granted in part*, 49 Fed. Reg. 10,260 (March 20, 1984) to provide a 16 km buffer zone for substandard Class C facilities which were required to attain full class facilities by March 1, 1987, or else be downgraded. *See Spacing Requirements in Effect until March 1, 1987, Pursuant to BC Docket 80-90*, 51 Fed. Reg. 26,010 (1985). Heidelberg argues that since WRSA(FM) had neither waived its buffer zone protection nor been downgraded by the close of the amendment as of right period for the Goodlettsville applications, the short-spaced applications must be returned.

6. Although Heidelberg noted that WRSA(FM) had filed a license application for its upgraded facilities (File No. BLED-861028KA) prior to the opening of the Goodlettsville filing window, it argues that such action did not affect WRSA(FM)'s entitlement to buffer zone protection.[1] However, buffer zone protection is accorded to affected stations only until the filing of a license application for facility upgrade. *See, e.g., Sue A. Underwood*, 3 FCC Rcd 153 (Mass Media Bur. 1988). Accordingly, since WRSA(FM) was no longer entitled to buffer zone protection, the noted applicants are properly spaced to WRSA(FM) and Heidelberg's objections are meritless. Accordingly, Heidelberg's informal objections will be denied. Furthermore, GBC's, SAR's, and Phoenix's requests for waiver of 47 C.F.R. § 73.207(a) will be dismissed as moot.

7. *SAR.* In Exhibit L-1 of its application, SAR reports that its officers and shareholders, Allen Williams and Sandra Kennedy, are employed by WSM, Incorporated, licensee of WSM-AM/FM, Nashville, Tennessee, and that Allen Williams is also employed by Gillett Broadcasting of Tennessee, Inc., licensee of WSMV(TV), Nashville, Tennessee. SAR states that its principals will terminate their employment should its instant application be granted. Conditions reflecting these commitments will be specified below.

8. *Heidelberg.* In Exhibit 1 of its application, Heidelberg reports that its general partner, John H. Heidelberg, is employed by WSM, Incorporated, licensee of WSM-AM/FM, Nashville, Tennessee, and that he will terminate this employment should Heidelberg's instant application be granted. condition reflecting this commitment will be specified below.

9. *Plummer.* In response to Item 6, Section V-B of FCC Form 301 (1985 ed.), Plummer indicates an antenna radiation center above mean sea level (AMSL) height of 1190 feet, while the tower sketch indicates a height of 1194 feet for the same parameter. However, by utilizing the height of the antenna radiation center above ground of 214 feet and the site elevation AMSL of 980 feet, a figure of 1194 feet can be calculated for the radiation center AMSL. Therefore, the staff is able to accurately determine that the correct value for the height of antenna radiation center AMSL is 1194 feet. However, Plummer will be ordered to file an amendment to its application with the presiding Administrative Law Judge within 30 days of the release of this Order correcting its height of antenna radiation center AMSL.

10. *Phoenix.* In Exhibit 1 of its application, as amended on February 27, 1987, Phoenix reports its interests in Phoenix of Nashville, Inc., licensee of WVOL(AM), Berry Hill, Tennessee, and in Phoenix of Hendersonville, Inc., licensee of WQQK(FM), Hendersonville, Tennessee, and that it will divest these interests should Phoenix's instant application be granted. A condition reflecting this commitment will be specified below.

11. Phoenix includes with its application a request for waiver of 47 C.F.R. § 73.207(a) for its short-spacing to the buffer zone of WDDJ(FM), Paducah, Kentucky. Phoenix also submitted a signed agreement with WDDJ(FM)'s licensee, Radio Paducah, Inc., wherein it agreed to waive its entitlement to buffer zone protection for consideration. This agreement was sufficient ground upon which to grant the requested waiver. *See Twin City Broadcasting, Inc.*, 2 FCC Rcd 7039 (Mass Media Bur. 1987). Additionally, on March 2, 1987, all buffer zones were dissolved and WDDJ(FM) was automatically downgraded. *See Public Notice*, FCC 87-93, released March 24, 1987. Accordingly, Phoenix's request for waiver of § 73.207(a) will be dismissed as moot.

12. *Holder.* Section II, Item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. The Holder application gives a Post Office Box number as the residence address of H. Randolph Holder, Jr. and Betty C. Holder. Accordingly, Holder must submit an amendment which gives all the

information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

13. *Lindsey*. Lindsey also includes with its application a request for waiver of 47 C.F.R. § 73.207(a) for its short-spacing to the buffer zone of station WDDJ(FM). Despite this technical deficiency, Lindsey's application was accepted for filing because it included a timely waiver request. *See, e.g., Twin City Broadcasting, Inc., supra.* However, as noted above, WDDJ(FM)'s buffer zone dissolved on March 2, 1987 and its facilities were automatically downgraded. Consequently, Lindsey's proposal now meets our separation requirements. Accordingly, Lindsey's request for waiver of § 73.207(a) will be dismissed as moot.

14. *Limited*. In Exhibit 3 to its application, Limited reports that its general partner, Camille Rucker, is an employee of WSM, Incorporated, licensee of WSM-AM/FM, Nashville, Tennessee. Limited fails to specify, however, in what capacity she is employed. Since WSM and the proposed station would serve substantially the same area, Rucker's employment potentially represents a violation of the Commission's cross-interest policy. Accordingly, Limited will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order providing a job description and detailing the position of Rucker at WSM. Upon evaluation of the amendment, the Judge will then determine whether an appropriate issue should be specified.

15. *Sinclair*. Sinclair included with its application a request for waiver of the Commission's city coverage rule, 47 C.F.R. § 73.315(a). It states that approximately 0.2596% of the total area of Goodlettsville would not receive a 70 dBu signal as required by the rule. However, we no longer require waiver of § 73.315 when more than 80% of the community of license will be included within the 3.16 mV/m contour; figures above 80% are presumed to be adequate. *See John R. Hughes, Inc.*, 50 Fed. Reg. 5,679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Accordingly, Sinclair's proposal is in substantial compliance with § 73.315(a) and its waiver request will be dismissed as moot.

16. *Other matters*. Engineering study of the applications below indicates that the proposed operations may significantly exceed the radio frequency radiation guidelines provided in 47 C.F.R. § 1.1307(b). Consequently, we are concerned that the applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set forth in newly added § 1.1307. If an application is determined to be subject to environmental processing under the § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised § 1.1311. Accordingly, the noted applicants will be required to amend their proposals within 30 days of the release of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operations and all nearby RF sources must be considered. Furthermore, since the applications may have a significant environmental impact, the applicants will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, copies of each shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of § 1.1308. Accordingly, the comparative phase of the case may commence before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

APPLICANTS: Bledsoe, Masterpeace, TWIB.

17. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
GBC	November 17, 1987
Phoenix	February 27, 1987
Holder	December 29, 1987
Community	March 11, 1988 [engineering]; September 15, 1988
RGI	September 28, 1987[2]
Benns	August 10, 1987; October 8, 1987; March 7, 1988; May 31, 1988; July 27, 1988; August 29, 1988
Sinclair	March 16, 1987; June 16, 1987 [engineering]; November 13, 1987.

18. In response to Section VI, FCC Form 301, the applicants below indicate that they will each employ five or more full-time employees. Each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with 47 C.F.R. § 73.2080(c) as set forth in FCC Form 396A, the five-point Model EEO Program. The following applicants have submitted EEO programs that are incomplete or otherwise deficient. Accordingly, the following applicants will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANTS	DEFICIENCIES
SAR	Failed to identify specific sources of recruitment specializing in women candidates.
Heidelberg	Failed to identify specific sources of recruitment specializing in women candidates.
Plummer	Failed to identify specific sources of recruitment specializing in women and minority candidates.
Innovative	Failed to identify: specific sources of recruitment specializing in women and minority candidates; educational institutions with substantial women and minority enrollments from which it intends to recruit employees; and

	printed media which have significant circulation or are of particular interest to minorities or women in which it intends to place employment advertisements.
Sinclair	Failed to identify specific sources of recruitment specializing in women candidates.

19. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and from the following applicants have been unsuccessful. Accordingly, since no determination has been received that the towers proposed by the applicants below would not constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA will be made a party to the proceeding.

APPLICANTS: Heidelberg, Plummer, Hartke, Francis, Limited.

20. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

21. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

22. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Bledsoe, Masterpeace, or TWIB, in which it is included that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Heidelberg, Plummer, Hartke, Francis, Limited.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

23. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of the Somerset, Kentucky Rule Making in MM Docket No. 88-31.

24. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Heidelberg ARE DISMISSED and, when considered as informal objections, ARE DENIED.

25. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. §573.207(a) filed by GBC, SAR, Phoenix, and Lindsey ARE DISMISSED AS MOOT.

26. IT IS FURTHER ORDERED, That in the event of a grant of SAR's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authority, permittee shall certify to the Commission that Allen Williams and Sandra Kennedy have terminated their employment with WSM, Incorporated, licensee of WSM-AM/FM, Nashville, Tennessee and that Allen Williams has also terminated his employment with Gillett Broadcasting of Tennessee, Inc., licensee of WSMV(TV), Nashville, Tennessee.

27. IT IS FURTHER ORDERED, That in the event of a grant of Heidelberg's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authority, permittee shall certify to the Commission that John H. Heidelberg has terminated his employment with WSM, Incorporated, licensee of WSM-AM/FM, Nashville, Tennessee.

28. IT IS FURTHER ORDERED, That Plummer shall submit the amendment described in paragraph 9 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That Holder shall submit an amendment which contains the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

30. IT IS FURTHER ORDERED, That in the event of a grant of Phoenix's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authority, permittee shall certify to the Commission that it has divested its interests in Phoenix of Nashville, Inc., licensee of WVOL(AM), Berry Hill, Tennessee, and in Phoenix of Hendersonville, Inc., licensee of WQQK(FM), Hendersonville, Tennessee.

31. IT IS FURTHER ORDERED, That Limited shall submit the amendment described in paragraph 14 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

32. IT IS FURTHER ORDERED, That Sinclair's request for waiver of 47 C.F.R. § 73.315(a) IS DISMISSED AS MOOT.

33. IT IS FURTHER ORDERED, That in accordance with paragraph 16 hereinabove, the following applicants shall each file within 30 days of the release of this Order

an amendment and an environmental assessment in compliance with 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with copies to the Chief, Audio Services Division: Bledsoe, Masterpeace, TWIB.

34. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated in paragraph 17 hereinabove: GBC, Phoenix, Holder, Community, RGI, Benns, Sinclair.

35. IT IS FURTHER OREDERED, That Holder's opposition to RGI's petition for leave to amend IS DISMISSED AS MOOT.

36. IT IS FURTHER ORDERED, That in accordance with paragraph 18 hereinabove, the following applicants shall each submit to the presiding Administrative Law Judge amendments to their Equal Employment Opportunity Programs within 30 days of the release of this Order: SAR, Heidelberg, Plummer, Innovative, Sinclair.

37. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

38. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

39. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

40. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] WRSA(FM) has also since filed an application for modification of these facilities, File No. BMPH-880212IA. Both the license and modification applications remain pending at this time.

[2] On November 5, 1987, Holder filed an opposition for leave to amend with respect to RGI's September 28, 1987 amendment. That amendment was filed pursuant to RGI's duty under 47 C.F.R. § 1.65 to update its application to reflect changes in the other media interests held by its principals. Holder's objection to the amendment is limited to any comparative advantage that RGI might receive as a consequence of the acceptance of this amendment. However, as noted above, the amendment is accepted pursuant to § 1.65, but no comparative advantage will attach. Accordingly, the opposition will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-275

Amendment of Part 80 of the Rules
to designate VHF marine channel 13
for bridge-to-bridge communication
on the Great Lakes

ORDER

Adopted: October 27, 1988; Released: November 14, 1988

By the Chief, Private Radio Bureau

1. On March 8, 1988, Part 80 of the Commission's Rules was amended in PR Docket 87-275 (3 FCC Rcd 1861) to designate VHF marine channel 13 (156.650 MHz), rather than the currently used channel 16 (156.800 MHz), for vessel bridge-to-bridge (navigational) communications on the Great Lakes. The effective date for these rule amendments was deferred until after the conclusion of an agreement with Canada to amend the Technical Regulations annexed to the Agreement between the United States and Canada for Promotion of Safety on the Great Lakes by Means of Radio, as amended (Great Lakes Radio Agreement). On August 10, 1988, an agreement with Canada was reached. Subsequently, a mutually acceptable date to implement the amended Great Lakes Radio Agreement was established as 0001 UTC February 1, 1989.

2. Accordingly, IT IS ORDERED that under the authority contained in Section 0.331 of the Commission's Rules, the effective date for the rule amendments in PR Docket 87-275 is 0001 UTC February 1, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Amendment of

Section 22.902(b) of Rules to permit nonwireline entity holding Block B frequencies to apply for Block B frequencies in Rural Service Areas — RM-6438

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, Mobile Services Division:

1. Independent Cellular Network, Inc. (ICN) has petitioned the Commission to institute a rule making proceeding to amend Section 22.902(b) of the Commission's Rules to permit nonwireline cellular operators authorized on the wireline frequency Block B to apply for the Block B frequencies within Rural Service Areas (RSAs) in the same vicinity as their existing Metropolitan Service Area (MSA) Block B operations. Of the seven parties that filed responsive pleadings, six were in opposition to the petition, one was in support of the petition. Two of the seven parties filed reply comments.[1] For the reasons set forth below, we deny the petition.

BACKGROUND

2. ICN is a nonwireline carrier providing service in two cellular markets and is in the process of completing construction of facilities in four additional cellular markets using frequency Block B authorizations acquired from a landline telephone company. As a nonwireline carrier, ICN is not eligible to apply for the Block B RSA authorizations.[2] ICN proposes to acquire such eligibility by a proposed amendment to Section 22.902(b) of the Commission's rules which would expand the class of entities eligible for Block B frequencies. In addition to common carriers engaged directly or indirectly in the business of affording public landline message service in some portion of the MSA or RSA for which application is being made, ICN would extend eligibility to "holders of authorizations for System B within MSAs adjacent to or surrounding an RSA." ICN asserts that the proposed change is "minor" and "should not increase the processing burden with respect to the RSA applications."

3. In support of its petition, ICN asserts that the present rule creates "an anomaly" which provides for a "fence" between the wireline and nonwireline frequency blocks in the initial licensing process and at the same time provides no impediment to the assignment of a Block B authorization to an entity not involved in traditional wireline service. ICN argues that the proposed changes are necessary in order for the Commission's competitive structure to be realized across MSA and RSA markets. It is conceded by ICN that under the current rule, the nonwireline holder of a Block B authorization in a MSA can apply for the Block A frequencies in the RSAs; but, ICN argues that the "economies and logical extensions into the surrounding RSAs could not be accomplished." Additionally, ICN notes that, without this "minor" change in the rule, the subscribing public will be denied the service and savings which could be best achieved by allowing nonwireline cellular operators to apply for the Block B frequencies within RSAs in the same area as their existing MSA Block B operations.

COMMENTS

4. Most of the seven comments and two reply comments were filed by potential wireline and nonwireline applicants and associations representing members who may be applicants. In its initial supporting statement, Cellular Technology, Inc. (CTI) agreed that the amendment would provide for the expeditious establishment of cellular service by experienced cellular service providers and that either wireline or nonwireline operators were now in the position to implement this service. CTI, like ICN, is not engaged in the business of affording public landline message telephone service within its MSAs; but, it has purchased the Block B authorizations in these MSA markets from a landline company. It asserted that the amendment would provide savings in switching, marketing and equipment and would eradicate the need for roaming agreements which would potentially decrease charges for long distance. Finally, CTI argued that the proposed rule change would ensure competition in the cellular marketplace and benefit the public interest. [3]

5. Six of the seven commenters opposed the petition. Two of these commenters supported the use of a *See* comments of United States Telephone Association (USTA), South Carolina Telephone Companies (SC Tele. Cos.), Bell Atlantic Mobile Systems, Inc. (Bell Atlantic), GTE Mobilnet Incorporated (GTE Mobilnet), BellSouth Corporation (BellSouth) and NYNEX Mobile Communications Commission (NYNEX); reply comments of GTE Mobilnet. Most of the seven commenters opposing the petition contend that such an amendment would be inconsistent with the regulatory objectives sought to be achieved by the wireline set-aside policy adopted by the Commission in *Cellular Communications Systems*, 86 FCC 2d 469 (1981); *aff'd* 89 FCC 2d 59 (1982); and reaffirmed in *Cellular Lottery Rule Making*, 98 FCC 2d 175, 192-198 (1984). Moreover, NYNEX asserts that "ICN offers no persuasive reason which would warrant the Commission departing from the set-aside policy which has repeatedly achieved the underlying regulatory purpose for which it was intended." *See, e.g., Amendment of the Commission's Rules for Rural Radio Service*, 2 FCC Rcd 3366 (1987); *Request of Metro Mobile CTS, Inc., For a Waiver of Section 22. 902 (b) of the Commission's rules, (Metro Mobile)*, Mimeo No. 4814 (released May 27, 1986) .

6. Most wireline commenters stressed that the change in the rule would inhibit competition, inhibit the expeditious provision of service, and be unfair to small carriers. The South Carolina telephone companies make clear in their comments that the telephone companies that are eligible under the current rules are just as capable of providing expedited service to the public as any cellular operator in an adjacent MSA. They note that they have been "waiting patiently for their chance to provide cellular service in their local service area." *See* comments of S.C. Tele. Cos at p. 4. In addition, these companies find no nexus between "fill-in" rights of original licensees and the rights

assigned to ICN by contract. Similarly, U.S.T.A. bases its opposition on a strict interpretation of the terms of express contracts and argues that "ICN could not be expected to have an expectation that what it received in an MSA should lead to greater privileges in a peripheral area." In addition, the wireline carrier making the MSA assignment may have no presence in the RSA and would itself be prohibited from applying for the RSA authorization. In this regard, NYNEX notes that this was a business acquisition decision by ICN in acquiring Block B frequencies and no inequities occur by denying the petition, as there is no prohibition to acquire the Block B license after the initial licensing process concludes. The untimliness issue is expanded by Bell Atlantic's and GTE Mobilnet's comments which focus on the fact that ICN, and others in its position, were aware of the rule when it purchased frequency Block B authorizations. Bell Atlantic saliently argues that RSA application deadlines have passed, applications have been filed, gone to lottery and selectees have been chosen. A change in the rule at this late juncture, the wirelines argue, would result in delay of service to the public, would not be a "minor" amendment, and would increase the potential applicants for Block B frequencies; thus, increasing speculation in the RSA application process and fundamentally inhibiting competition.

7. BellSouth's contention that the proposed rule making is not the proper remedy, as the rule making process is too lengthy given the immediacy of RSA filing dates, mirrored those of the other wirelines commenters. However, BellSouth suggested that a waiver policy, to be considered on a case-by-case basis under 47 CFR 22.19(C) of the Commission rules would serve the public interest by maintaining a competitive balance, discourage speculation and ensure rapid service by quality servicers of cellular systems. BellSouth proposed that the waiver alternative be available reciprocally to wirelines who have acquired Block A frequencies who wish to apply for Block A frequencies in RSAs. CTI concurred that in adopting a waiver policy, the Commission would eliminate delay in the application process as this will not increase the number of potential applicants and "given the small number of nonwireline purchasers of wireline systems, it is extremely unlikely that small landline operators will be prejudiced by the grant of a waiver." CTI concludes that, even if any small wireline operators are affected by the waiver, the public interest in permitting expanded MSA cellular service to the RSAs outweighs this detrimental effect.

DISCUSSION

8. After reviewing and evaluating all of the comments and reply comments, we deny the petition for rule making for the amendment of Section 22.902(b) of the Commission's rules. We agree with the commenters, NYNEX, Bell Atlantic and GTE Mobilnet that adoption of the petition would result in the delay of cellular service to the public and would be inconsistent with our adoption and retention of the wireline set-aside as recently summarized in the *Order on Reconsideration in Amendment of the Commission's Rules for Rural Radio Service*, 2 FCC Rcd 3366 at 3369 (1987):

> Among our reasons for retaining the set-aside or 'fence,' we concluded that the wireline set-aside would assure that both large and small telephone companies will have an opportunity to participate in cellular service: that if rural telephone companies were precluded from providing cellular service they may lose their landline subscribers: that this wireline dichotomy is consistent with our historical treatment of these two classes of carriers: and that in general that wireline set-aside has been effective in expediting cellular service to the public.

In *Cellular Lottery Rule Making, supra* at 194-198, we received a request to eliminate the wireline set-aside provision for rural cellular systems and, after considering the matter at length, concluded that there were ample public interest factors and equities present to retain the wireline set-aside through the conclusion of the initial filing periods for all cellular applications, including what we now refer to as RSAs.

9. Further, as emphasized by Bell Atlantic, changes to the RSA rules at this late date would disrupt the Commission's aggressive RSA filing schedule, as well as the RSA applications which have already been filed.[4] We agree that the ICN petition would drain valuable Commission resources away from the primary task of getting cellular service to RSAs.

10. ICN's proposed rule change would rearrange a market structure which we have repeatedly found enhances the facilities-based competition that the wireline set-aside was designed to produce. Maintaining the current rule would assure that both wireline and nonwireline communications carriers will be assured adequate representation in their respective markets and will be given the opportunity to offer the public products and services based upon their own traditions of price, quality and service. *Metro Mobile, supra* at par.4. Any waiver of this policy will be considered on a case-by-case basis, analyzing all of the affirmative showings required by Section 22.19(a) of the Commission's rules. *See Metro Mobile, Id.* The retention of the wireline set-aside and eligibility policy does not preclude ICN or any other similarly situated entity from entering into arrangements that will permit the efficient provision of service to customers.[5] During the initial application process, entities filing for Block B frequencies must be landline common carriers who have a presence in the RSA. However, once both carriers have been authorized, the primary purpose of the set-aside has been served and a cellular applicant may apply for either frequency block.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, That the Petition for Amendment of Section 22.902(b) of the Commission rules to permit nonwireline entity holding Block B frequencies to apply for Block B Frequencies in RSAs filed by Independent Cellular Network, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

APPENDIX A

COMMENTERS TO PETITION FOR AMENDMENT OF SECTION 22.902 (b) OF THE COMMISSION' S RULES

Bell Atlantic Mobile Systems, Inc.
BellSouth Corporation
Cellular Technology, Inc.
GTE Mobilnet Incorporated
NYNEX Mobile Communications Commission
South Carolina Telephone Companies
(20 local exchange telephone companies represented by John W. Hunter, Esq., McNair Law Firm, P.A.)
United States Telephone Association

FOOTNOTES

[1] *See* Appendix A for a list of the commenters.

[2] Section 22.902(b) of the Commission's rules provides in pertinent part that:

> For cellular systems the assignment of frequencies will be divided into two blocks. . . Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular system B in those areas in which they provide such landline service in some portion of the cellular market; except that in the final cellular application phase for any initially unapplied for or unlicensed area, . . . either within or without a Metroplitan Statistical Area (MSA) or New England County Metropolitan Area (NECMA), a cellular applicant may apply for either frequency block . . .

[3] CTI analogized the proposed expansion of eligibility to the proposed rule for "fill-in" where the transferees and assignees of RSA cellular systems would receive the right to "fill-in" the RSA when they acquired the authorization for the entire CGSA of the RSA cellular system. *Fourth Notice of Proposed Rule Making* concerning the RSAs, FCC 88-157, released June 30, 1988. CTI argued that nonwireline cellular operators should have the same right to apply to expand service into adjacent RSAs, a right held by their wireline assignor or transferor.

[4] Eighteen lotteries for RSAs have already been held and by December 8, 1988, forty-eight additional lotteries will have been held. The Mobile Services Division has split the country into five blocks of application filings; three blocks have already been accepted for filing.

[5] It bears noting that unserved portions of MSAs where the five year "fill-in" period has elapsed are available and a few nonwireline's have already applied for these authorizations.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-373

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit Business Radio Use of Certain Channels in the 150 MHz Band	RM-6276

ORDER

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, Private Radio Bureau:

1. On October 14, 1988, the Private Radio Bureau extended the time to file comments in the above-captioned proceeding to December 14, 1988. *Order Extending Comment Period*, DA 88-1637, 53 Fed. Reg. , (1988). On October 21, 1988, we received a Motion to Withdraw Comments from Forest Industries Telecommunications (FIT). FIT filed comments on October 14, 1988, unaware of our action extending the comment deadline. FIT states that we should return its comments so that other parties would not have the advantage of knowing in advance FIT's position on the issues of this proceeding.

2. We find good cause to grant FIT's motion. Accordingly, IT IS ORDERED, that the comments of FIT filed on October 14, 1988, be removed from the docket file and returned to FIT. This action is taken pursuant to the authority contained in Section 0.331 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

MOTOROLA, INC. File No. 597589-YX

Application to use one of
the 150 original 800 MHz
conventional frequency pairs
in a trunked mode of operation

ORDER

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, Private Radio Bureau:

1. The Chief, Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules, 47 C.F.R. § 90.615, filed by Motorola, Inc., (Motorola). Motorola, the licensee of a fully-loaded ten channel trunked SMR system in Miami, Florida, seeks to expand its system by adding an unused (unlicensed) conventional channel available under Section 90.615 of the Rules.[1] Frequencies available under Section 90.615 may only be used for conventional operations; trunked operation is not permitted. Motorola argues that allowing it to add this conventional frequency to its system and operate in the trunked mode will increase spectrum efficiency.

2. We agree with Motorola that allowing trunking on this additional channel in these circumstances would increase spectrum efficiency.[2] There are, however, other criteria besides spectrum efficiency that we must consider in deciding upon Motorola's request. We must determine whether allowing Motorola to add this unused 800 MHz conventional channel to its existing fully-loaded trunked system would undermine the fundamental purpose of Section 90.615; *ie.*, whether grant of the requested relief is in the public interest.[3]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire 800 MHz operations but do not require a trunked system. There has, however, been no expression of interest by any other party for the conventional channel requested by Motorola. Motorola is already operating a fully-loaded trunked system and needs additional capacity.[4] Allowing Motorola to increase the capacity of its trunked system through the addition of this unused frequency is consistent with the Commission's objective of promoting the development and use of spectrally-efficient technologies to facilitate maximum use of scarce spectrum resources. Such action does not undermine the public policy purpose of Section 90.615, but simply recognizes that allowing Motorola to add this unused channel to its trunked system will benefit the public by providing additional capacity to meet the demand for service. Under these circumstances, we conclude that it is in the public interest to allow Motorola to use this channel to expand its trunked system, pending the outcome of any further proceedings in PR Docket No. 87-213.

4. Accordingly, Motorola's request for waiver of Section 90.615 of the Rules to expand its system by trunking over an unused (unlicensed) conventional channel is granted, pursuant to Section 0.331 of the Rules,[5] subject to Motorola's filing of the appropriate frequency coordination documents, and subject also to the outcome of any further proceedings in PR Docket No. 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[6] will remain applicable despite the fact that the frequency will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Ralph Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Accompanying Motorola's request for waiver is a copy of a signed FCC Form 405A that indicates the sole licensee on the conventional frequency being sought by Motorola wishes to cancel the license. The license has been cancelled and the frequency is now unused.

[2] We have initiated an inquiry to determine whether the public interest would be served by permitting trunked operations on the 800 MHz conventional frequencies. *See* Notice of Inquiry, PR Docket No. 87-213, 2 FCC Rcd 3820 (1987). The Commission is currently reviewing the comments and reply comments filed in this proceeding.

[3] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[4] Motorola's need for the requested channel is demonstrated by the fact that its system will still be fully loaded even after this expansion.

[5] *See* 47 C.F.R. § 0.331.

[6] *See* 47 C.F.R. § 90.621.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

WLAK ELECTRONICS SERVICE, INC. File No. 616812-YX

Application to use one of the 150 original 800 MHz conventional frequency pairs in a trunked mode of operation

ORDER

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, Private Radio Bureau:

1. The Chief, Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules, 47 C.F.R. § 90.615, filed by WLAK Electronics Service, Inc. (WLAK). WLAK, the licensee of a fully-loaded five channel trunked SMR system, seeks to expand its system by adding two unused (unlicensed) conventional channels available under Section 90.615 of the Rules. Frequencies available under Section 90.615 may only be used for conventional operations; trunked operation is not permitted. WLAK argues that such use of the frequencies is spectrum efficient, and will provide needed relief to the end users of its system, which is overloaded.

2. We agree with WLAK that allowing trunking on these additional channels in these circumstances would increase spectrum efficiency.[1] There are, however, other criteria besides spectrum efficiency that we must consider in deciding upon WLAK's request. We must determine whether allowing WLAK to add these two conventional channels to its existing fully-loaded trunked system would undermine the fundamental purpose of Section 90.615; *i.e.*, whether grant of the requested relief is in the public interest.[2]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire 800 MHz operations but do not require a trunked system. There has, however, been no expression of interest by any other party for the conventional channels requested by WLAK. WLAK is already operating a fully-loaded trunked system and needs additional capacity.[3] Allowing WLAK to increase the capacity of its trunked system through the addition of these unused frequencies is consistent with the Commission's objective of promoting the development and use of spectrally-efficient technologies to facilitate maximum use of scarce spectrum resources. Such action does not undermine the public policy purpose of Section 90.615, but simply recognizes that allowing WLAK to add these unused channels to its trunked system will benefit the public by providing additional capacity to meet the demand for service. Under these circumstances, we conclude that it is in the public interest to allow WLAK to use these channels to expand its trunked system, pending the outcome of any further proceedings in PR Docket No. 87-213.

4. Accordingly, WLAK's request for waiver of Section 90.615 of the Rules to expand its system by trunking over two unused (unlicensed) conventional channels is granted, pursuant to Section 0.331 of the Rules,[4] subject to WLAK's filing of the appropriate frequency coordination documents, and subject also to the outcome of any further proceedings in PR Docket No. 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[5] will remain applicable despite the fact that the frequencies will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Ralph Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] We have initiated an inquiry to determine whether the public interest would be served by permitting trunked operations on the 800 MHz conventional frequencies. *See* Notice of Inquiry, PR Docket No. 87-213, 2 FCC Rcd 3820 (1987). The Commission is currently reviewing the comments and reply comments filed in this proceeding.

[2] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[3] WLAK's need for the requested channels is demonstrated by the fact that its system will still be fully loaded even after this expansion.

[4] *See* 47 C.F.R. § 0.331.

[5] *See* 47 C.F.R. § 90.621.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

MOTOROLA, INC. File No. 601326-YX

Application to use one of
the 150 original 800 MHz
conventional frequency pairs
in a trunked mode of operation

ORDER

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, Private Radio Bureau:

1. The Chief, Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules, 47 C.F.R. § 90.615, filed by Motorola, Inc., (Motorola). Motorola, the licensee of a fully-loaded thirteen channel trunked SMR system in Lantana, Florida, seeks to expand its system by adding an unused (unlicensed) conventional channel available under Section 90.615 of the Rules. Frequencies available under Section 90.615 may only be used for conventional operations; trunked operation is not permitted. Motorola argues that allowing it to add this conventional frequency to its system and operate in the trunked mode will increase spectrum efficiency.

2. We agree with Motorola that allowing trunking on this additional channel in these circumstances would increase spectrum efficiency.[1] There are, however, other criteria besides spectrum efficiency that we must consider in deciding upon Motorola's request. We must determine whether allowing Motorola to add this unused 800 MHz conventional channel to its existing fully-loaded trunked system would undermine the fundamental purpose of Section 90.615; *i.e.*, whether grant of the requested relief is in the public interest.[2]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire 800 MHz operations but do not require a trunked system. There has, however, been no expression of interest by any other party for the conventional channel requested by Motorola. Motorola is already operating a fully-loaded trunked system and needs additional capacity.[3] Allowing Motorola to increase the capacity of its trunked system through the addition of this unused frequency is consistent with the Commission's objective of promoting the development and use of spectrally-efficient technologies to facilitate maximum use of scarce spectrum resources. Such action does not undermine the public policy purpose of Section 90.615, but simply recognizes that allowing Motorola to add this unused channel to its trunked system will benefit the public by providing additional capacity to meet the demand for service. Under these circumstances, we conclude that it is in the public interest to allow Motorola to use this channel to expand its trunked system, pending the outcome of any further proceedings in PR Docket No. 87-213.

4. Accordingly, Motorola's request for waiver of Section 90.615 of the Rules to expand its system by trunking over an unused (unlicensed) conventional channel is granted, pursuant to Section 0.331 of the Rules,[4] subject to Motorola's filing of the appropriate frequency coordination documents, and subject also to the outcome of any further proceedings in PR Docket No. 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[5] will remain applicable despite the fact that the frequency will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Ralph Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] We have initiated an inquiry to determine whether the public interest would be served by permitting trunked operations on the 800 MHz conventional frequencies. *See* Notice of Inquiry, PR Docket No. 87-213, 2 FCC Rcd 3820 (1987). The Commission is currently reviewing the comments and reply comments filed in this proceeding.

[2] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[3] Motorola's need for the requested channel is demonstrated by the fact that its system will still be fully loaded even after this expansion.

[4] *See* 47 C.F.R. § 0.331.

[5] *See* 47 C.F.R. § 90.621.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAYLINE SYSTEMS, INCORPORATED — File No. I-T-C-88-204

Application for authority to operate as an international resale carrier.

AMERICAN TELESYSTEMS — File No. I-T-C-88-205

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, International Facilities Division

1. The above-captioned applications, filed on September 9 and 12, 1988 respectively, by Payline Systems Incorporated (Payline) and American Telesystems (AT) request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on September 21, 1988. No comments were received.

2. The applicants are non-dominant domestic resale common carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Payline and AT.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-88-204 and I-T-C-88-205 ARE GRANTED, and a) Payline is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and US Transmission Systems' Tariff F.C.C. No. 2, between the United States and those points listed in those tariffs; and b) AT is authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

7. IT IS FURTHER ORDERED the the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. The Commission's temporary authority, (I-T-C-88-204/T-1), granted to Payline on September 15, 1988 is hereby terminated.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT TELECOMMUNICATIONS CORPORATION File No. I-T-C-88-203

Application for authority to lease and operate facilities for direct service to Algeria.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on September 7, 1988, by TRT Telecommunications Corporation, (TRT), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between the U.S. and Algeria and beyond. The application was placed on public notice on September 21, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Algeria by TRT.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-203 IS GRANTED, and TRT is authorized to:

a. lease from WU World Communications Inc. (WU Worldcom) and operate four telegraph-grade (50-baud) half-circuits a in previously authorized voice-grade bearer circuit between the U.S. and Algeria; and

b. use said facilities to provide TRT's regularly authorized services between the U.S. and Algeria and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRT and its correspondent in Algeria, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-88-201

Application for authority to acquire and operate facilities for service to Egypt.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, International Facilities Division

1. The above-captioned application, filed on August 30, 1988, by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate submarine cable facilities and domestic connecting facilities for service to Egypt. The application was placed on public notice on September 7, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international message telephone service (IMTS) to Egypt by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-201 IS GRANTED, and TRTI is authorized to provide its IMTS services between the U.S. and Egypt and beyond by acquiring the following facilities from TRT Telecommunications Corporation (TRT)[1] on a cost flow through basis:

a. six voice-grade half-circuits in the TAT-6 cable system;

b. six voice-grade half-circuits in French landline facilities between the TAT-6 cablehead at St. Hilaire, France and the SEA-ME-WE cablehead at Marseilles, France; and

c. six voice-grade half-circuits in the SEA-ME-WE cable system between Marseilles, France and Alexandria, Egypt (consisting of Segment H between Marseilles and Palermo and Segment G between Palermo and Alexandria).

3. TRTI IS FURTHER AUTHORIZED to lease and operate six voice-grade circuits between its New York operating office and the TAT-6 cablehead at Greenhill, Rhode Island.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Egypt, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] TRT proposes to acquire these international facilities in accordance with Section 63.10 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY — File No. CSG-88-041-P/L

Application for authority to construct an international earth station at Mossville, Illinois, for the provision of INTELSAT Business Services.

ORDER AND AUTHORIZATION

Adopted: November 1, 1988; Released: November 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on April 26, 1988, by American Telephone & Telegraph Company (AT&T), requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Mossville, Illinois, for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on June 1, 1988. No comments were received. The applicant has been granted authority to establish and operate channels of communication between the U.S. and various international points for the provision of IBS service.[1]

2. The proposed earth station will consist of an 8.1 meter antenna meeting INTELSAT Standard F-2 technical parameters, and communicating with an appropriate INTELSAT satellite in the Atlantic Ocean Region (AOR) in the 6/4 GHz bands. The earth station will be constructed at Mossville, Illinois, and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. AT&T's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. AT&T has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT Standard F-2 technical parameters. AT&T has completed the necessary frequency coordination.

5. The scope of operation of the proposed earth station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-041-P/L IS GRANTED, and AT&T is authorized to construct and operate the proposed earth station at Mossville, Illinois, to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. The Commission's temporary authorization, granted June 17, 1988, is hereby terminated.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T *et al.*, File No. I-T-C-85-035 *et al*, Mimeo No. 3220 (released March 18, 1985.)

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* the cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* American Telephone & Telegraph Co., File No. CSG-86-013-P/L, Mimeo No. 3321, (released March 25, 1986).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-58

In the Matter of:

Amendment of Section 73.202(b),	RM-5408
Table of Allotments,	RM-5464
FM Broadcast Stations,	
(Oxford and New Albany,	
Mississippi)	

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1988; Released: November 14, 1988

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition, filed by Oxford Radio, Inc. (Oxford Radio), seeking reconsideration of the Commission's *Report and Order* in this proceeding (*Report and Order)* granting a request by WTMX, Inc. (WTMX) to substitute FM Channel 294C2 for Channel 296A at New Albany, Mississippi, modifying its license to reflect the higher class channel, and denying the proposal of Oxford Radio to substitute Channel 294C2 for Channel 296A at Oxford, Mississippi.[1] Oxford Radio requests that the Commission reconsider the *Report and Order* which, it maintains, improperly concludes that the upgrade proposed by WTMX will better serve the public interest.

2. The *Report and Order* was the outgrowth of a *Notice of Proposed Rule Making* [2] issued in response to separate petitions for rule making filed by Oxford Radio and WTMX. Oxford Radio requested the substitution of Channel 294C2 for 296A at Oxford, Mississippi, and modification of its license for Station WKLJ(FM) to specify operation on the higher class channel. WTMX proposed that the Commission substitute Channel 294C2 for Channel 292A at New Albany, Mississippi, and modify its license for WTMX-FM to reflect the upgrade. The Commission determined that although the proposals would provide wide area coverage for their respective communities, minimum distance separation requirements precluded allotment of Channel 294C2 to both. The *Notice*, therefore, suggested that the parties submit comparisons of the proposed areas of increased coverage (gain areas) to assist the Commission in deciding between the two mutually exclusive proposals.

3. After review and analysis of the comments submitted in response to the *Notice*, the Commission issued a *Report and Order* concluding that allotment of Channel 294C2 to New Albany, as proposed by WTMX, would better serve the public interest. To choose between the conflicting proposals, the Commission relied on the FM allotment priorities set forth in *Revision of FM Policies and Procedures*. [3] Examination of the proposals indicated that, because the other allotment criteria were equal or inapplicable, our decision would have to be based on the fourth priority, other public interest matters. In view of each petitioner's intent to improve and expand an existing service, we stated that under this priority it would be appropriate to favor the proposal which would bring new service to the larger population. Thus, it was necessary to compare the respective gain areas to ascertain which proposal would serve a larger population within the predicted Class C2 contours. Our methodology for making this comparison was set out in *Greenup, Kentucky and Athens, Ohio*.[4] There, the Commission specified the criteria it would consider and the methodology it would follow in cases where proposals are compared under the "other public interest matters" priority.

4. Until *Greenup* the Commission had not indicated any methodology which it expected parties to utilize when preparing gain area showings. Therefore, it waived all requests for gain area showings made in notices of proposed rule making issued prior to the release of *Greenup* and began substituting its own engineering and population analysis in resolving conflicting upgrade proposals.[5] Because the *Notice* in the instant proceeding was adopted before *Greenup*, the request therein for gain area comparisons was waived. As a result, the Commission decided, in the *Report and Order*, that the failure of WTMX to file a gain area showing was insignificant.[6] In lieu of the gain area studies submitted by the parties, the Commission conducted an analysis on behalf of WTMX and Oxford Radio. Using publicly available census data and the methodology set out in *Greenup*, it compared the two proposals and concluded that the New Albany upgrade, proposed by WTMX, would bring the benefits of a new primary service to a greater number of people. Accordingly, the proposal of Oxford Radio was denied and the upgrade of WTMX, New Albany, Mississippi, was granted.

5. The petition before us challenges our *Report and Order* on several grounds. Oxford Radio believes reconsideration is warranted because WTMX failed to submit technical support for its proposal, in the form of a gain area study, in violation of its obligation to do so. Further, it asserts that, even if the WTMX proposal is preferable, the licensee has substantial tax liabilities which call into question its ability to complete the requested upgrade. Thus, Oxford Radio concludes, WTMX's financial condition renders disingenuous its promise to immediately construct upgraded facilities.[7] Finally, Oxford Radio maintains that the Commission's decision was improper because it was based solely on an internal study which was never released for public comment or made part of the record in this proceeding. Finally, Oxford Radio argues that the Commission's failure to include its gain area study in the record, prior to releasing the *Report and Order*, precluded review of, and comment on, the staff position. The need for public comment is especially evident in this situation, Oxford Radio claims, because the final decision rested upon Commission results which were substantially different than those submitted by Oxford Radio, and while Oxford Radio's study was subject to review and comment, the Commission's study was never available for such scrutiny. Oxford Radio concludes that this is a procedural error which fatally flaws the Commission's *Report and Order* and requires reconsideration of its decision.[8]

6. Oxford Radio requests that the Commission reconsider its decision to substitute Channel 294C2 for Channel 292A at New Albany, Mississippi, and, instead, substitute Channel 294C2 for Channel 296A at Oxford, Mississippi, as the only attainable proposal, because WTMX is not

financially capable of constructing upgraded facilities. However, even if the Commission finds WTMX financially capable of upgrading its facilities, Oxford Radio maintains that the procedural flaws in the *Report and Order* require reconsideration and action consistent with the Commission's rules and the Administrative Procedure Act (APA).

7. After careful review of the pleadings, we conclude that Oxford Radio has not presented any issues which require reconsideration of our *Report and Order*. As an initial matter, Oxford Radio's allegations regarding the financial instability of WTMX, and the potential impact on its ability to complete the requested upgrade, are not properly considered at the rule making stage. Financial allegations go to the basic qualifications of a licensee and are considered at the application stage, if at all.[9] Further, in claiming that WTMX's lack of a gain area study is a fatal deficiency, Oxford Radio reasserts an argument which was previously considered by the Commission and disposed of in the *Report and Order*.[10] It is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has once deliberated and spoken. The public interest in expeditions resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered.[11]

8. Finally, Oxford Radio maintains that the Commission's decision was improper because it was based on an internal gain area study which was not released prior to the final decision and, thus, was unavailable for comment in violation of the APA. Contrary to Oxford Radio's assertion, however, our procedure comports with judicial requirements that, when using publicly available data, as the Commission did here, interested persons must be on notice only as to the methodology used and the meaning to be accorded the results.[12] Although detailed disclosure of the methodology is preferred at the earliest moment in a rule making, such disclosure is at least required in the final decision, thus, permitting reconsideration and judicial review.[13] We explicitly stated in *Greenup* that the detailed methodology set out therein would be used to compare upgrade proposals in the future. Thus, parties were on notice as to the methodology the Commission would use and the significance to be accorded the results of such an analysis. However, because the *Notice* here was adopted before the gain area methodology, and in order to avoid unfairly prejudicing either party, we conducted the gain area analysis on behalf of each petitioner pursuant to the *Greenup* methodology, and set out the procedure and results in the *Report and Order*. In this regard, our procedure was not flawed, nor was Oxford Radio deprived of any notice to which it is entitled.

9. The purpose of the disclosure requirement is to enable parties to focus on the information relied on by the agency and point out where that information is erroneous.[14] Oxford Radio, however, does not challenge our methodology or our conclusions other than to point out that they differ from their own results. If Oxford Radio wished to challenge our results it could have demonstrated that the methodology was wrong or, if it reached different results using the procedure set out by the Commission, offer an engineering study showing these results. Oxford Radio chose to do neither.[15] We conclude that Oxford Radio presents no procedural or substantive reasons which convince us to alter our decision that the proposal of WTMX will bring the benefits of new service to a greater number of people than will Oxford Radio's proposal.

10. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Oxford Radio, Inc. IS DENIED.

11. For further information concerning this proceeding, contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (1988).

[2] *Oxford and New Albany, Mississippi, Notice of Proposed Rule Making* in MM Docket No. 87-58, 2 FCC Rcd. 1774 (1987) (*Notice*).

[3] 90 FCC 2d 88 (1982). These priorities are:

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

[4] 2 FCC Rcd 4319 (1987) (*Greenup*).

[5] *Id.* at 4321.

[6] *Report and Order*, 3 FCC Rcd at 616.

[7] In a timely filed supplement to its petition, Oxford Radio reiterates its belief that reconsideration is warranted because WTMX is financially incapable of completing the proposed upgrade, as demonstrated by the fact that WTMX had recently instituted bankruptcy proceedings.

[8] Oxford Radio also filed a "Further Supplement to Petition for Reconsideration" presenting evidence that WTMX had ceased broadcasting. Paul Slatton and Associates Broadcasters, Inc. (Slatton) filed a Petition for Leave to file Opposition to Petition for Reconsideration and an Opposition to Petition for Reconsideration. Because Slatton's opposition was late filed it will not be considered herein. In additin, WTMX filed a request for official notice and an opposition to the petition for reconsideration. WTMX requested that the Commission take official notice of the fact that it had withdrawn its petition for bankruptcy and returned to operations with extended hours. Further, WTMX refuted Oxford Radio's arguments regarding its gain area study and the Commission's use of a staff study. Although we take notice of the facts regarding the withdrawal of WTMX's bankruptcy petition and its return to service, those facts are not critical to our decision in this proceeding. We have not, however, considered the other arguments advanced by WTMX in its opposition.

[9] In this regard, we note that WTMX(FM) has filed a minor change application for a construction permit specifying the new facility. File No BPH-880624ID. Oxford Radio has filed an informal objection to the grant of the application of WTMX which details the financial status of WTMX. The informal objection was filed August 22, 1988.

[10] *Report and Order*, 3 FCC Rcd 615, 617 n. 3 (1988). *See also, Greenup, Kentucky, and Athens, Ohio*, 2 FCC Rcd 4319, 4321 (1987) in which the Commission waived all requests for gain area

studies in proceedings where the notices were issued prior to the adoption of that decision. Because the *Notice* in the instant case was adopted prior to *Greenup*, the request therein for gain area showings was waived.

[11] *Practices and Procedures*, 46 RR 2d 524, 526 (1979).

[12] *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986).

[13] *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978).

[14] *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied.*, 469 U.S. 1227 (1985).

[15] In similar circumstances, it has been decisionally significant that the petitioner did not take issue with the ultimate conclusions of the agency nor explain what it would have said if it had access to an agency study earlier than the final decision. Any error, under these circumstances, was considered harmless. *Air Transport Association of America v. Civil Aeronautics Board*, 732 F.2d 219, 224 n. 11 (D.C. Cir. 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-514

In re Applications of

The Stockholders of PAN PACIFIC TELEVISION, INC. (Transferors) File No. BTCCT-861126KE

and

SILVER KING BROADCASTING OF NORTHERN CALIFORNIA, INC. (Transferee)

For Transfer of Control of Pan Pacific Television, Inc., Permittee of Television Station KPST-TV, Vallejo, California

PAN PACIFIC TELEVISION, INC. File No. BLCT-870316KH

For a License to Cover Construction of Facilities for KPST-TV, Vallejo, California

MEMORANDUM OPINION AND ORDER AND HEARING DESIGNATION ORDER

Adopted: October 13, 1988; Released: November 15, 1988

By the Commission:

1. The Commission has before it: an application (BTCCT-861126KE) for consent to the transfer of control of Pan Pacific Television Inc. (PPTV), permittee of operating Station KPST-TV, Channel 66, Vallejo, California, from its shareholders, Victor H. Sun, Wallace Lee, David Li and Shirley C. Lau, to Silver King Broadcasting of Northern California, Inc. (Silver King); and an application (BLCT-870316KH) for a license to cover the construction of KPST-TV's facilities filed by PPTV. Also pending are a petition to deny the transfer application, and an informal objection directed against the license application, both filed by John S. Wong and Pen Holdings, Inc. (Petitioners).[1] Although we find that many of the petitioners' allegations are without merit, we nevertheless find, for the reasons explained below, that substantial and material questions of fact have been raised with respect to possible misrepresentations to the Commission and alien control of the permittee.

BACKGROUND

2. As the result of a settlement of a comparative hearing, PPTV (formerly Bay Area Community Television, Inc.) received the construction permit to build a new commercial television station on Channel 66 at Vallejo, California. *Golden State Television, Inc.*, FCC 84D-81, released December 3, 1984 (hereinafter referred to as *Initial Decision)*. In addition, the *Initial Decision* resolved an issue, raised at hearing, involving alleged alien control of the applicant favorably to PPTV. Specifically, the presiding Administrative Law Judge granted a competitor's "petition to enlarge" and designated an issue[2] to examine whether PPTV had "sufficient alien ownership or control to bar a license under Section 310 of the Communications Act [of 1934, as amended, 47 U.S.C. Section 310]."[3] That issue arose from allegations that there was a "direct involvement of Taiwanese Television Enterprise Co., Ltd. (TTV) in [PPTV]."[4] TTV is a Republic of China company, a foreign corporation, that operates a television network in Taiwan. In resolving that issue, the ALJ accepted the testimony of PPTV principals that, among other things: (a) PPTV is controlled by its principals; (b) the principals of PPTV paid for their own stock with their own personal or family funds; (c) none of those funds came from TTV or any other foreign source; and (d) neither TTV nor any other foreign entity has ever had any ownership interest in or control over PPTV. In addition, testimony was received that after it abandoned its plans to operate a U.S. television station, TTV sought David Li to develop an American subsidiary, to be known as TTV America, to produce and distribute Chinese language programming in the U.S., to sell Taiwan-produced programming here, and to "facilitate the business operations of TTV in the United States."[5] The presiding ALJ concluded that, among other things, the denials by the PPTV principals and the evidence received on the past association of TTV with PPTV "are cumulatively sufficient to constitute a preponderance of the evidence that [PPTV] has no [impermissible] alien ownership or control . . . ."[6] Accordingly, PPTV was awarded the construction permit.

3. While the station was being constructed, PPTV and Silver King began the negotiations for the sale of KPST-TV that led to the filing of the instant transfer application. Silver King, the proposed transferee, is a subsidiary of Home Shopping Network, Inc. (HSN). On August 1, 1986, the parties reached an agreement for the sale of the station, and on September 10, 1986, they executed a formal agreement for, among other things, the filing of an application within five days after the station commences operations to effectuate the sale of PPTV's stock to Silver King for approximately eight million dollars.[7]

4. On September 30, 1986, PPTV requested special temporary authority (STA) to begin transmitting programming on the station and temporary waiver of the main studio location and program origination provisions of Section 73.1125 and 73.1130 of the Commission's Rules. It stated that, except for its studio facilities, construction of KPST-TV was complete and the station was prepared to start operating immediately. In addition to the extensive renovation of the building purchased to house the station's main studio, PPTV reported that its efforts to complete

construction had been further hampered by difficulties in obtaining local zoning approval for a microwave studio transmitter link. Although it intended to complete construction prior to the expiration of its permit, PPTV had made temporary arrangements in order to initiate KPST-TV's new service as expeditiously as possible.

5. Pen Holdings filed an informal objection opposing PPTV's STA and temporary waiver requests. It claimed, among other things, that PPTV had failed to provide an adequate basis to assume that the failure to complete construction of the main studio was due to factors beyond its control. It alleged that the issuance of the STA coupled with waiver of main studio obligations would permit PPTV to realize substantial profits from the planned sale of the station without having fulfilled the terms of its construction permit in contravention of Section 73.3597(c) of the Commission's Rules, which essentially limits such payment to reimbursement of sums "legitimately and prudently expended" to construct the station. Pen Holdings further questioned PPTV's commitment to serve the Vallejo community of license during the pendency of the requested STA in light of its agreement to carry HSN programming prior to Silver King's acquisition of the station, asserting that it is unlikely that any benefit would result from such programming "other than that provided by the proposed purchasers of the station." Finally, Pen Holdings argued that the terms of a loan Silver King made to PPTV suggested that the completion of construction was to be undertaken at the behest, and under the supervision, of Silver King. Those facts, combined with the agreement to carry HSN programming, led Pen Holdings to conclude that a substantial and material question was raised as to whether PPTV may have prematurely transferred control of KPST-TV to Silver King, the prospective transferee.

6. By letter dated November 17, 1986, the Chief, Video Services Division granted the PPTV's requests and dismissed Pen Holdings' informal objection. In so doing, the staff first noted that it is the Commission's long-standing policy to expedite the provision of new broadcast services to the public, an objective heightened when the service in question, as here, represents the first such broadcast outlet in the community. The permittee's inability to complete construction of its main studio prior to the expiration of its permit, the staff explained, did not require finding that PPTV was not diligent in those efforts to build or that it would be unable to complete the facility in a timely manner. While the completion of a main studio in Vallejo would be necessary before a license could be issued for KPST-TV, the staff concluded that the grant of PPTV's requests was justified in order to expedite the provision of this new service.

7. To the extent that Pen Holdings claimed that the permittee was attempting to circumvent Section 73.3597 restrictions on the transfer of construction permits, the staff concluded that such matters were not immediately germane to the decision of whether the issuance of the requested STA was appropriate and would serve the public interest. It was explained that approval of the STA and waiver requests would not result in the KPST-TV construction permit being placed in another party's control. Further, the staff noted that the public interest benefits underlying the grant of PPTV's requests were not diminished merely because such action could incidentally facilitate the planned station sale. However, the staff also stated that at such time that the contemplated transfer application was filed, all facts and circumstances, including the status of the station's main studio, would be examined in order to determine whether the public interest would be served by the transaction as proposed.

8. The staff was also unable to conclude, on the allegations then before it, that there had been an unauthorized transfer of control of the KPST-TV permit to either Silver King or HSN. It was explained that so long as PPTV retains the right to determine the basic policies concerning the construction or operation of the station, the fact that it has entered into an affiliation agreement with HSN and has obtained a loan from Silver King does not establish that either, or both, will improperly influence or otherwise interfere with the operations of KPST-TV. Pen Holdings had not presented any specific and supported factual allegations sufficient to question PPTV's ability, under the terms of the affiliation agreement, to reject any HSN programming it so chooses. Further, there was no basis to determine that Silver King's loan to PPTV was anything other than a *bona fide* arms-length transaction; the fact that the liability for that loan may later be assumed by Silver King as part of the consideration paid for the station, it was explained, did not compel a finding that a transfer of control had taken place.

9. Finally, the staff rejected Pen Holdings' assertions that PPTV's requests must be denied based on programming considerations. It was explained that the conclusion to grant the requested STA and waivers was based on policies favoring the earliest commencement of a new television service and not on the particular programming proposed. The staff observed that so long as PPTV meets the mimimum operating hours and technical requirements specified in our rules, the particular type of programming it would provide during its stewardship of the station is a matter approximately left to its own independent judgment, consistent with Commission policies. It was explained that nothing alleged by Pen Holdings required Commission action.

10. Subsequently, on January 27, 1987, PPTV filed an application requesting an extension of time to complete construction of the station. It stated that although KPST-TV was broadcasting 160 hours per week pursuant to the STA, two principal aspects of construction remained to be completed, namely the main studio in Vallejo and the microwave relay facility that would link that studio to its transmitter. It stated that it was still in the process of obtaining the various local authorizations for the construction of these facilities and remodeling the building purchased for the station's main studio. Further, it maintained that because of the delays that PPTV would still face before it could complete the permanent facilities, it was considering constructing a temporary main studio behind the unremodeled building it had obtained for that purpose. PPTV stated that it had been advised that the use of a trailer for that purpose would be possible with the local permits it had already obtained, and that microwave facilities were also available on a temporary basis for use as a studio transmitter link. Such a plan, according to PPTV, would enable it to began operating from a Vallejo studio on an expedited basis.

11. On March 6, 1987, PPTV informed the Commission that KPST-TV began operating pursuant to program test authority. Further, it stated that on March 4, 1987, the station began originating all of its nonnetwork programming from a studio in Vallejo in compliance with Sections 73.1125 and 73.1130 of the Commission's Rules. Shortly

thereafter, PPTV submitted the subject license application to cover the construction of the authorized facilities, explaining that because of delays in the renovation of its main studio building, it had located a construction trailer in the parking lot of that building to serve as KPST-TV's Vallejo studio.

THE PETITION TO DENY

12. On November 26, 1986, the subject application to transfer control of PPTV to Silver King was filed. In their petition to deny, Mr. Wong and Pen Holdings allege that because KPST-TV had only recently began operating, the proposed transaction would violate Section 73.3597(a), which, they claim, prohibits the sale of a station authorization obtained after a comparative hearing until it has been operated by the permit holder for at least one year. They also maintain that KPST-TV remains an "unbuilt station," rendering the proposed sale of stock at a profit a violation of Section 73.3597(c)(2) of the Rules. Finally, the petitioners contend that significant questions exist as to whether PPTV and its shareholders have misrepresented or failed to disclose material facts with respect to the identity and interests of its principals. For these reasons, they urge that the transfer application be denied or designated for hearing to inquire into these matters. These issues will be addressed individually below.

13. *One Year Holding Requirement.* Section 73.3597(a) of the Commission's Rules essentially provides that if a broadcast station construction permit is authorized after a comparative hearing, an application to assign or transfer that authorization will be designated for hearing if it appears that the station involved has been operated on-air by the current permittee or licensee for less than one year. In their petition to deny, Mr. Wong and Pen Holdings contend that Section 73.3597(a) prohibits the proposed transaction because the KPST-TV authorization was obtained "as the result of a lengthy comparative hearing," and PPTV has not operated the station for the requisite period of time. Noting that the Commission's stated rationale for Section 73.3597(a) is to assure that parties to a contested proceeding actually provide certain minimum service commitments to the public before being allowed to sell the station, the petitioners maintain that the nearly six-year proceeding that resulted in the grant of the KPST-TV authorization to PPTV consumed valuable Commission time and resources, as well as delayed the introduction of a first television service to Vallejo. Moreover, they believe that PPTV's present operation of KPST-TV with HSN provided programming only until the Commission approves the subject transfer differs substantially from the programming promises it made to the Commission in the hearing by which it was awarded the construction permit, and is inadequate to meet the requirement that a party that obtains its authorization in a contested case "at least minimally fulfill the expectations upon which the grant was made." Therefore, they urge that under these circumstances, the transfer application should be denied and PPTV "should be required to pay back the public by providing at least one year of its proposed service before it can sell the station authorization."

14. *Discussion.* Review of this allegation indicates that there is no basis to grant the relief the petitioners request. The one-year holding period contemplated by Section 73.3597(a) does not apply when, as here, the authorization was obtained by Commission approval of a proposed settlement agreement rather than by a comparative award. *See, e.g., Newsystems of Pennsylvania, Inc.*, 2 FCC Rcd 73 (1987). Such settlement agreements, even when approved late in the comparative process, are generally viewed as serving the public interest by expediting the institution of new service, while conserving the resources of the parties and the Commission. Moreover, we are unable to conclude that KPST-TV's present program service is inadequate, or otherwise jeopardizes the integrity of the Commission's processes. While we certainly must be able to rely on the representations of applicants before us, we also recognize that a change of circumstance may affect the nature of any proposal when implemented. There is nothing to indicate that the particular programming proposals advanced by PPTV during the comparative hearings were untrue when made. In that regard, we reiterate that so long as PPTV meets the minimum operating hours and technical requirements specified in our rules, it may be viewed as having fulfilled the basic expectations upon which the grant was made. The particular type of programming it provides during the stewardship of the station is a matter appropriately left to its own independent judgment, consistent with Commission requirements. *See Commercial TV Stations*, 98 FCC 2d 1076, 1093-94 (1984), *recon. denied*, 60 RR 2d 526 (1986), *affirmed in part, and remanded on other grounds*, 821 F.2d 741 (D.C. Cir. 1987). Accordingly, we find that this allegation raises no substantial question requiring further exploration in an evidentiary hearing.

15. *The Sale of An " Unbuilt Station. "* The petitioners also allege that the proposed transaction, as structured by the parties, circumvents the Section 73.3597(c)(2) prohibition on the realization of profit from the sale of an unbuilt station.[8] They maintain that, as a matter of FCC policy, the holder of a broadcast authorization may seek such a profit only after the station commences operations because in so doing, it fulfills its basic commitment to the Commission and, in the process, introduces a new service to the public. Here, however, the petitioners contend that because PPTV has not even minimally fulfilled the representations upon which the KPST-TV grant was made, the transferors should not be permitted to profit from this transaction.

16. The petitioners note that when the parties agreed to the subject transfer of control, KPST-TV was neither constructed nor operating. They claim that the station became operational only after Silver King undertook the ultimate responsibility for completing the facilities by agreeing, among other things, to assume all of PPTV's outstanding liabilities at the time of sale, including, presumably, all costs associated with making KPST-TV an operating station. As a result of its arrangement with Silver King, according to the petitioners, PPTV not only gave up any intention to complete construction of a main studio in Vallejo as represented, but also abandoned the detailed programming promises made to the Commission in the hearing by which it obtained the construction permit. In that regard, the petitioners assert that, by the arrangement of the parties, KPST-TV is operating "as the buyer's station," broadcasting its HSN programming 24 hours a day. They thus maintain that KPST-TV is in operation only as a result of Silver King's *de facto* control, both before and after the station began broadcasting on November 25, 1986.[9] The petitioners therefore conclude that, as a matter of law and policy, because PPTV itself has failed to meet

the expectations created by its representations, it should not be permitted to profit from the proposed transfer to Silver King.

17. In its opposition, PPTV rejects the suggestion that it has failed to meet the minimal expectations of either the Commission or the public such that KPST-TV must be considered an "unbuilt station" for purposes of this transaction. It contends that, contrary to the petitioners' allegations, PPTV has: acted expeditiously to commence the earliest possible institution of KPST-TV service, even before the expiration of its construction permit; ensured community access to the station by placing, and making available during normal business hours, its public file and employees in Vallejo; and provided and promoted local programming that serves the needs and interests of its community of license.[10] Thus, PPTV maintains that it has fully demonstrated its responsiveness and commitment to serve the needs and interests of its community of license and its entire service area.

18. *Discussion.* On the basis of the facts before us, we are unable to conclude that KPST-TV should be considered an "unbuilt station" pursuant to Section 73.3597(c)(1)(i). On November 25, 1986, KPST-TV began broadcasting pursuant to the grant of an STA request. At that time, KPST-TV's technical facility was complete and the permittee was prepared to begin operation of the first television station licensed to serve Vallejo. The only deviation from the terms of the permit was the completion of a main studio in the community of license prior to the expiration of the construction permit. Nevertheless, PPTV established a temporary office in the community of license to assure public access to the station. The fact that the permittee had previously entered into an agreement to sell the permit to HSN, or that the grant of its request may have incidentally facilitated a sale at such time as an application might be filed, was not a factor in the staff's grant of the STA request. While the issuance of an STA is by no means automatic, the staff's decision reflects the Commission's long-standing policy to expedite the provision of new broadcast services to the public, an objective heightened when the service in question represents the first broadcast outlet in the community. Under these circumstances, where the permittee had fully constructed its technical facility as required in the construction permit and established a presence in the community of license, we find that the staff's grant of the STA in this case was correct, and the petitioner has raised no basis to revisit that decision. Moreover, when it acquired a facility in Vallejo for its main studio, PPTV began operating pursuant to the program test provisions of Section 73.1620 of the Rules and filed the subject application for a license. As the staff explained in the context of the requested STA, so long as PPTV meets the Commission's technical and operating requirements, its choice of the particular type of programming to be broadcast is not, of itself, immediately relevant to the issue of whether a license to cover construction should issue. Moreover, the fact that the parties reached an agreement for the proposed transfer prior to the completion of the construction of the main studio is of little significance here. Under a literal interpretation of Section 73.3597(c)(1)(i), stations operating under an STA are unbuilt. However, because all of the terms of the station's construction permit had been met, except for the main studio, before the filing of the transfer application, we conclude on these facts, that KPST-TV should be considered an "operating station," for purposes of Section 73.3597 of the Rules, although operating under an STA. *See Syracuse Channel62, Inc.*, 60 RR2d 1161 (1986). Moreover, now that the station has begun operating pursuant to program test authority pending consideration of its license application, and despite disagreements with PPTV's business judgments, the petitioners have presented no basis to conclude that KPST-TV should be viewed as an "unbuilt station" for purposes of the proposed transaction.

19. *Misrepresentation / Alien Control or Ownership.* The petitioners maintain that substantial and material questions exist as to whether PPTV misrepresented, was lacking in candor, or did not disclose the interests of aliens in the permittee. For the most part, the petitioners' allegations in this regard involve facts not considered by the ALJ in the award of the construcion permit to PPTV. *See* paragraph 2, *supra*. The allegations now before us stem, in large part, from two meetings concerning the possible sale of the KPST-TV construction permit to Pen Holdings. As he states in a declaration accompanying the petition, Mr. Pen, President of Pen Holdings, had been engaged in discussions during June and July of 1986 with officials of TTV who were representing PPTV in the sale of the construction permit to Pen.[11] He asserts that in a July 31, 1986, meeting with PPTV principals Li, Lee and Lau, they "acknowledged . . . that they do not own the percentages of stock in [PPTV] that they have consistently advised the Commission they hold." This fact, according to Mr. Pen, was confirmed by TTV President Stone Shih in a meeting the next morning with Mr. Pen and several of his employees. There, he relates, he was provided a package of materials on PPTV and KPST-TV which indicated that Messrs. Sun, Lee, Li and Mrs. Lau (the transferring shareholders) owned 100 percent of PPTV's stock. When Mr. Pen questioned that fact in light of the previous day's discussions with the PPTV principals, he states that the TTV officials informed him that the transferring shareholders own only a combined 27.8 percent interest, with the remaining 72.2 percent ownership interest held by Emmet Hsu, grandson of TTV Chairman C.T. Hsu, and TTV itself.[12] He further asserts that he was told that TTV Chairman Hsu had also assisted PPTV by personally guaranteeing a 3.8 million dollar equipment loan for it from the Taiwanese-owned International Commercial Bank of China.[13] Mr. Pen maintains that as a result of those revelations and in order to make a offer for KPST-TV competitive with that of Silver King, he requested that TTV President Shih provide him with accurate information as to the interest and identity of PPTV shareholders, as well as any relevant information regarding any investments, loans, or guarantees made on behalf of PPTV. Mr. Pen states that he never received a response to that request. He later learned that PPTV reached its final agreement to sell its assets to Silver King.

20. The petitioners maintain that these facts raise a serious question as to the qualifications of the proposed transferors. They believe that if those facts are true, there is a substantial variation from the ownership information consistently provided by PPTV to the Commission from the comparative hearing to the present. If the represented ownership was, in fact, true at the time of the hearing, the petitioners conclude that sometime subsequent to the grant of the KPST-TV construction permit, PPTV's stated shareholders transferred a controlling stock interest in the permittee without Commission approval in violation of Section 310(d) of the Communications Act. If, on the other hand, the stock of PPTV has not changed, the

petitioners surmise, the statements of ownership made at the hearing were false. No definitive conclusions were reached at the comparative hearing, the petitioners assert, due to the fact that the presiding ALJ, by approving the settlement of the comparative proceeding, received no proposed findings of facts and conclusions of law on these issues from the competing applicants. The petitioners further suggest that in light of the questions raised at the hearing with respect to TTV, PPTV's shareholders were, or should have been, aware of the ramifications of a continuing involvement with TTV and those associated with it. For these reasons, the petitioners urge that the subject applications be denied or designated for hearing to inquire into these matters.

21. In its opposition pleading, PPTV denies that it is controlled by TTV rather than the transferors, and states that the petitioners allegations to the contrary are supported only by hearsay and misstatements. PPTV asserts that the meeting with TTV officials, at which Mr. Pen claims he learned of the matters raised in the petition, did not take place, rendering the account of that meeting "inherently unreliable." In support, PPTV notes that Mr. Pen claims that the meeting in question took place on the morning of August 1, 1986. Yet, according to PPTV, TTV President Shih, with whom Mr. Pen supposedly met, did not arrive in San Francisco until shortly before noon on that date. PPTV further maintains that this is not the only conversation that Mr. Pen describes in detail in the petition to deny that never occurred or has been misrepresented. For example, while conceding that Mr. Pen did meet with certain PPTV principals on July 31, 1986, it claims that at no time was anything stated to the effect that the transferring shareholders do not control the permittee or that other parties were necessary to negotiate a sale of the station. As to Mr. Pen's claim that he asked TTV President Shih to send him written confirmation of PPTV's ownership structure, PPTV rejects any implication that the refusal to respond substantiates the allegations raised in that regard. PPTV maintains that, in fact, Mr. Shih decided not to reply "because he would be very embarrassed by his previous failure to bring about an agreement" between PPTV and Mr. Pen.

22. PPTV states that whether or not Mr. Pen was confused, incorrect or merely misunderstood the negotiations for the sale of the KPST-TV permit, it remains that he claims no firsthand knowledge that Mr. Hsu or his family own any interest in the permittee and has failed to provide any extrinsic evidence of any kind to support the allegations contained in the petition to deny. Nevertheless, PPTV provides the declaration of TTV Chairman Hsu, who avers that neither he, any member of his family, nor TTV has ever owned any interest in PPTV.[14] Further, he states that he has never personally guaranteed any loans from the International Commercial Bank of China (ICBC) to PPTV.[15] PPTV acknowledges that it did obtain an equipment loan from ICBC, but that it was fully secured by the items purchased with the funds.

23. PPTV further argues that the petitioners' allegations not only lack any factual basis, but also lack internal consistency. It contends that if TTV actually controlled PPTV and wanted to sell the station to Pen Holdings as claimed by the petitioners, it could have simply ordered that the station be sold in that manner. Conversely, it maintains that the very fact that PPTV is controlled by the transferring shareholders led to the decision to sell to Silver King. Finally, PPTV asserts that having failed to make a supportable argument, the petitioners have asked the Commission to reconsider the questions regarding PPTV's compliance with Section 310(d) of the Act with regard to alien interests that were raised and resolved in the comparative hearing to award the KPST-TV authorization. It rejects the suggestion that the presiding ALJ's decision on those matters was somehow inadequate because PPTV's competitor did not file proposed findings of fact and conclusions of law, or that the development of a full record was prevented by the parties reaching a settlement. In fact, it states, PPTV presented testimony by individuals named in the competing applicant's motion to enlarge, and these witnesses were all subjected to cross-examination. Moreover, it argues that the presiding ALJ's opinion reflects a thorough review of, and is fully supported by, the record, providing no basis for the petitioners' implication that the issues were not fully considered. As such, and because there was no appeal of the decision to award the construction permit to PPTV, it argues that relitigating the issues resolved in the comparative hearing would be wasteful and inconsistent with sound judicial principles.

24. In a reply pleading, the petitioners reject PPTV's challenge to the accuracy of their account of the meetings between Pen and officials of TTV and PPTV. First, the petitioners concede that they mistakingly described the August 1, 1986, meeting between principals of TTV and Pen Holdings as having taken place in the morning. They state that, although a morning meeting had been scheduled, due to the late arrival that day of TTV President Shih in San Francisco, that meeting actually took place later that afternoon. In any event, the petitioners maintain that, regardless of the time, there is little doubt that the meeting occurred.[16] Further, the petitioners submit the contemporaneous notes and declarations of participants at that meeting which, they claim, confirm the accuracy of the allegations contained in the petition.

25. The petitioners further maintain that evidence exists of substantial yet undisclosed involvement in KPST-TV by TTV Chairman Hsu in violation of Section 310(b) of the Act. In the declarations of six individuals from Pen Holdings who attended the August 1, 1986 meeting with TTV officials, it is stated that: the TTV delegation claimed to represent the holders of the majority interest in PPTV; and, reading from records to document their claim, that the transferring shareholders collectively own only approximately 27 percent of PPTV's stock, with the remaining interest controlled by TTV and Chairman Hsu's grandson. The petitioners assert the complete information provided by the TTV officials at that meetings, as recounted in the contemporaneous notes of the Pen Holdings participants, reveals that TTV was credited with 500,000 dollars of the initial capital contribution of PPTV and that Emmet Hsu accounted for 660,000 dollars and that an additional 200,000 dollar investment was later made by TTV in the name of the transferring shareholders "to reward them for their efforts before the Commission." The petitioners reject PPTV's assertion that these claims are unsupported hearsay, arguing that, under the Federal Rules and Evidence, TTV's statements are not hearsay, or would otherwise be admissible as an exception to the hearsay rule, because, among other things, these statements: were made by the transferring shareholders or agents chosen to represent them; were statements made against PPTV's and TTV's interests; and were based on the reading of business records, citing, generally, Fed.

Rules Evid. Rules 801-805. Thus, the petitioners contend that the statements made by the TTV officials constitute serious representations that the Pen Holdings group had every reason to credit, particularly because they were made to induce an offer to acquire PPTV's stock. The fact that the statements made by the TTV officials matches the admissions of certain PPTV shareholders made the day before, the petitioners maintain, is additional indicia of their probative value.[17]

26. The petitioners next note that in response to the claim that he helped to obtain financing for PPTV, TTV Chairman Hsu stated, in his declaration, that he did not personally guarantee the ICBC loan. However the petitioners maintain that they have learned that that 3.8 million dollar loan in question was, in fact, guaranteed by another Taiwan corporation, Shihlin Electric Company (Shihlin), whose Chairman of the Board is TTV Chairman Hsu.[18] The petitioners allege that in addition, Shihlin directly loaned 941,000 dollars to PPTV in September 1985, as evidenced by schedules attached to the sales agreement between PPTV and Silver King, reflecting PPTV's liabilities. The petitioners therefore contend that not only did Chairman Hsu's corporation make one loan and guarantee another for the permittee, but also that a question remains as to whether he financed his grandson Emmet's 666,000 dollar investment in PPTV reflected in the TTV documents shown to Pen Holdings.[19] Further, the petitioners believe that TTV or Chairman Hsu may have financed or induced two apparently interest-free loans granted to PPTV and reflected in documents provided Pen Holdings; namely a 601,000 dollar loan by Emmet Hsu, and a 245,000 dollar loan by Helen Hsu (no relation), President of TTV America, Ltd. (TTV/America), a wholly owned subsidiary of TTV.[20]

27. As to PPTV's contention that their allegations are not supported by documents or extrinsic evidence, the petitioners argue that the specific documentation that supports their charges remains in the possession of TTV or PPTV and, prior to any discovery, would be difficult for them to produce. Moreover, although PPTV asserts that the failure of TTV President Shih to respond to Pen Holdings' request for that information is attributed to embarrassment, the petitioners maintain that they have unsuccessfully requested declarations from other TTV officials present at the August 1, 1986 meeting, but have been told that TTV's lawyer or Chairman Hsu instructed them not to respond. For these reasons, the petitioners argue that PPTV's opposition pleading fails to address adequately the allegations contained in the petition to deny, requiring an evidentiary hearing to resolve the substantial and material questions of fact that exist.

28. Following the conclusion of the pleadings cycle established by Section 73.3584 of the Rules, PPTV filed comments on the petitioners' reply. Essentially, PPTV asserts that the petitioners' reply should be stricken because it raises many allegations for the first time in violation of Section 1.45, which limits such pleadings "to matters raised in the oppositions." However, as to those charges, PPTV maintains that Mr. Pen's account of the August 1, 1986, meeting is unsupported by affidavits of those with personal knowledge of the facts alleged as required by the Communications Act and the Commission's Rules. It argues that the declarations of Pen Holding's officials submitted by the petitioners are inconsistent and not based on their knowledge of what was in fact said in Chinese by TTV President Shih at that meeting, but rather the English translations by their employer, Mr. Pen. PPTV further states that those declarants "make it clear that the only documents they read . . . [at that] meeting were in a package that had been prepared from [PPTV's] books and records during the preceding few days by [Mr. Shih, assisted by another] TTV employee, and by [PPTV's] bookkeeper . . . ." These documents, PPTV asserts, were given to Mr. Pen during his discussions with the TTV officials, and contain nothing to suggest that the transferring shareholders own less than 100 percent of PPTV, or that either TTV or Emmet Hsu has any interest in the permittee. Thus, PPTV maintains, in the absence of statements of those with personal knowledge or other proper documentation to support their allegations, the petitioners' charges are based on mere speculation. Moreover, PPTV submitted with its comments further declarations of those it claims have personal knowledge to confirm that the transferring shareholders each paid for their interest in the permittee with personal or family funds, and that TTV never made any payment on their behalf to PPTV.

29. Among those declarations is that of PPTV principal Edward C.Y. Lau,[21] who recounts that the funds expended to construct KPST-TV came primarily from three sources - the company's stockholders, bank loans from the Taiwanese bank, ICBC, and loans from Shihlin. He states that, as reported in the *Initial Decision* awarding PPTV the construction permit, the presiding ALJ found that shareholders' initial capital contributions came from personal or family sources, and not from TTV or any other foreign entity.[22] He further avers that PPTV obtained two loans from ICBC to finance the purchase of equipment; 250,000 dollars borrowed in late 1983, and the 3.8 million dollar line of credit obtained in September, 1985, the latter disclosed in a schedule to the stock purchase agreement with Silver King. He states that although the petitioners refer to the Shihlin prospectus to conclude that that company guaranteed the 3.8 million dollar line of credit, PPTV "had no knowledge of any such guarantee until it received [the reply pleading]." Mr. Lau further asserts that when he interviewed Chairman Hsu on January 14, 1987, in Taiwan, he never mentioned the loan guarantee. However, Mr. Lau acknowledges that after receiving the reply pleading, he asked Emmet Hsu, who now works for Shihlin in Taiwan, to ask his grandfather if Shihlin had given such a guarantee to ICBC. He relates that Emmet Hsu then told him "that his grandfather confirmed that he had arranged for Shihlin to provide such a guarantee, but that he had deliberately not told [PPTV] about it because he did not want [PPTV] to think that, because the loan was guaranteed, [PPTV] could skip loan payments due to ICBC." Mr. Lau further reports that when he asked Emmet Hsu as to why his grandfather had not mentioned the Shihlin guarantee during the January 14, 1987 meeting in Taiwan, the response was that "his grandfather said he did not mention the loan guarantee because [Lau] had not specifically asked about it." Mr. Lau asserts that indeed he did not ask as he had no idea that the guarantee existed, as evidenced by his approval of the statement, in PPTV's opposition, that "the loan was fully secured by the equipment purchase from the loaned funds." Mr. Lau also states that PPTV is current on its payments to ICBC under the line of credit.

30. Mr. Lau's declaration also acknowledges that PPTV is obligated to Shihlin under a note for 941,000 dollars executed in September, 1985, which is included in the stock purchase agreement filed with the transfer applica-

tion. He states that the amount of that note reflects a total of 866,000 dollars in cash advances and 75,000 dollars in technical engineering services provided by Shihlin in connection with consultation on the equipment at the station's transmitter and studio. Mr. Lau further declares that the loan was arranged by Chairman Hsu at the request of PPTV shareholder and principal David Li, who prior to his association with PPTV was President of TTV/America, and through 1985, the advances were all received through Emmet Hsu and were recorded on PPTV's books as loans repayable to him. He states that, in September, 1985, as the corporation's attorney, he insisted that the Shihlin obligation be reduced to writing and, on September 27, 1985, PPTV executed a 941,000 dollar note. Thereafter, he asserts, additional advances were received through Emmet Hsu and, in 1986, Helen Hsu, and were recorded as loans repayable to them. Moreover, he notes that when the TTV officials reviewed PPTV's books just prior to its August 1, 1986, meeting with Mr. Pen, they clearly noticed that the permittee's records showed 601,000 dollars owing to Emmet Hsu and 245,000 owing to Helen Hsu, accounting for the "Statement of Short-Term Loan" given to Mr. Pen and reflecting these figures. Mr. Lau concedes that from an examination of PPTV's records, it might have been reasonably concluded that the permittee did owe 601,000 dollars to Emmet Hsu personally, and that the money showing as owed to Helen Hsu was actually owed to TTV, due to her position as President of TTV/America, as PPTV's books did not show otherwise.

31. Mr. Lau continues, in his declaration, that as of July 31, 1986 the total cash advances to PPTV from Shihlin was 846,000 dollars (601,000 through Emmet Hsu and 245,000 through Helen Hsu), and increased to 866,000 dollars in August, 1986, when an additional 20,000 dollars was received through Helen Hsu.[23] Mr. Lau further asserts that he was recently advised by Emmet Hsu that some or all of the Shihlin advances received through him came from his own personal funds for which he was reimbursed by Shihlin. Although he states that he has no knowledge of what financial transactions may have occurred between Emmet Hsu and Shihlin, Mr. Lau states that PPTV owes 941,000 dollars to Shihlin, and as of August 1986, it did not owe anything to Emmet Hsu. Moreover, he states that PPTV has no indebtedness to TTV, although on one occasion in 1985, Chairman Hsu "arranged for a short-term loan of 100,000 dollars to enable [PPTV] to make a down payment on the transmitter equipment it was purchasing" from NEC America, Inc.[24] That loan, according to Mr. Lau, was recorded on PPTV's books as short-term loan from TTV Deputy Manager of Administration George Mo,[25] which was repaid ten days later. Mr. Lau also states that the financial records reviewed by the TTV officials also revealed other short-term, apparently interest-free loans, including: a 50,000 dollar loan to PPTV, recorded as a short-term loan from TTV/America in February, 1985, "at a time when PPTV was temporarily short of cash" and repaid in May, 1985; and a 10,000 dollar loan from Helen Hsu on June 6, 1986, when PPTV "was short of cash," which was repaid four days later.[26]

32. Mr. Lau rejects the petitioners' suggestion that PPTV keeps two conflicting sets of financial records, one shown to Mr. Pen during the discussions with TTV officials, and the other provided by PPTV to Silver King and attached to the stock purchase agreement. He states that PPTV only keeps one such set of books, but when the TTV officials reviewed them in July, 1986, to prepare for their meeting with Mr. Pen, a number of entries had not yet been made to reflect some of these and other financial transactions. Mr. Lau asserts that when PPTV prepared a July 31, 1986 balance sheet for Silver King, he directed that it reflect all liabilities, whether paid for or not.

33. As to the petitioners' assertion that PPTV may have violated a Commission rule by failing to report Emmet Hsu's role in the permittee, Mr. Lau declares that Mr. Hsu has never been an officer, director or shareholder of PPTV. He states that during most of 1985, Mr. Hsu was a salaried employee of PPTV with the title of "Financial Manager." As to the fact that the petitioners point out that he was identified as "Treasurer" on PPTV's workers compensation insurance policy, Mr. Lau asserts that that was a mistake that occurred when the policy was obtained. He relates that business discussions regarding the policy were conducted in Chinese among Mr. Hsu, PPTV's bookkeeper, and the insurance agent, and that the mistake may have resulted from an error in translation by the insurance agent that wrote the policy. In that regard, Mr. Lau states that he has been told that in Chinese, the title "Financial Manager" is equivalent to the title of "Treasurer." Moreover, he states that because Emmet Hsu was a salaried employee of the company, it is his opinion that if he had sustained a job related injury, he would have had a claim under the policy and his purported exclusion as "Treasurer" would have been ineffective to defeat that claim. In any event, Mr. Lau reiterates, at no time was Emmet Hsu a corporate officer of PPTV.

34. Accordingly, PPTV contends that not only are the petitioners allegations rank hearsay and not based on personal knowledge, but they were improperly withheld until the reply pleading. In any event, it argues that those allegations are refuted by PPTV's records and the sworn declarations of its principals whose statements are based on personal knowledge. Moreover, PPTV maintains that, given the implications of the petitioners account of what transpired between Pen Holdings and TTV and taking their declarations at face value, the Commission might consider that Mr. Pen and his associates were "more than willing to condone a violation of the alien ownership provisions of the Communications Act" by negotiating with what it believed to be an illegal owner. Further, it asserts that the petitioners purpose in filing their petition to deny is to cause delay in the hope that the proposed transfer will be terminated, leaving Mr. Pen free to acquire the KPST-TV authorization. Thus, PPTV argues that Mr. Pen and his associates "can hardly claim to have clean hands," and, having failed to raise any substantial and material question of fact, the petition should be denied and the transfer application granted promptly.

35. In response to PPTV's "comments," the petitioners maintain that these matters were not "raised for the first time" in their reply, were "limited to matters raised in the opposition," and therefore were properly addressed in a responsive pleading.[27] They argue that the PPTV pleading contains "admissions of substantial - and intentionally hidden - foreign involvement in KPST-TV [that] raise significant issues for the Commission to consider."

36. *Discussion.* The petitioners argue that the above-alleged facts raise a substantial and material question as to whether the permittee misrepresented, or was less than candid regarding, its actual ownership or control. They maintain that in light of PPTV's understanding of the alien ownership and control restrictions of Section 310 of the Communications Act, developed during the hearing

by which it obtained the KPST-TV authorization, PPTV had a clear motive to "hide the truth" from the Commission.

37. As previously noted, during the comparative hearing which resulted in PPTV obtaining the KPST-TV construction permit, a Section 310 issue regarding possible alien control of the applicant was raised. The facts underlying the specification of that issue were, for the most part, different from the allegations now before us. However, that issue did involve allegations regarding the role of TTV and its Chairman, C.T. Hsu, in the applicant. At the hearing (and in pleadings filed in this proceeding), PPTV represented that it was controlled by its principals; that no funds came from TTV or any other foreign source; and that neither TTV nor any other foreign entity had any control or ownership of the applicant. However, from the material now before us, much of it obtained in response to the petitioners' allegations, it appears, among other things, that:

(a) PPTV obtained periodic short-term, interest-free loans from TTV Chairman Hsu, his relatives, companies owned and controlled by him, or his employees;

(b) TTV Chairman Hsu played a principal, and previously denied, role in PPTV's acquisition of the loan from the Taiwanese bank, ICBC;

(c) The ICBC loan was not secured by the equipment purchased with those funds as represented, but was secured by an undisclosed guarantee extended by another of TTV Chairman Hsu's companies (Shihlin) at his behest;

(d) TTV Chairman Hsu personally assisted in negotiations for equipment "at the lowest possible price." In fact, some portion of that equipment was purchased from a company (NEC) apparently related to others controlled by Chairman Hsu, and only after he intervened and lent PPTV the funds necessary to make a down payment. Shihlin also provided "technical engineering services" in connection with that equipment;

(e) The permittee would receive free programming from TTV during its initial operations; and

(f) The permittee used TTV and its employees as its representatives in discussions with prospective purchasers of the station. TTV and its employees were also used to prepare and present PPTV's financial documents in those negotiations.

While it is not clear that the statements made at the hearing were false when made, it is not now apparent that they are still true. It also appears that TTV Chairman Hsu and/or his companies, employees and relatives have played a critical role in securing for the permittee its financing, as well as obtaining equipment, completing construction of the station, and assuring that it would have free programming when it was ready to commence operations. In addition, TTV and its employees represented PPTV in negotiations to sell the construction permit.[28] Based on the foregoing, we conclude that a substantial question of fact exists as to whether PPTV misrepresented material facts, or was lacking in candor, to the Commission, particularly in light of the many inconsistent statements made in response to the petitioners' allegations.

38. We also find that a substantial and material question of fact exists as to whether the permittee is under alien control or ownership in violation of Section 310(b) of the Communications Act. In certain instances, the ascertainment of control, of necessity, transcends precise formulas since it involves issues of fact which must be resolved by the specific circumstances presented. *Southwest Texas Public Broadcasting Council*, 49 RR 2d 157, 158 (1981). The petitioners believe that the role of TTV and Chairman Hsu in the construction of the station, its financial matters, and programming reflect those indicia of control examined by the Commission in order to determine whether an unauthorized transfer has taken place. We agree, and note that the Commission has also found, that the presence of other factors may result in findings that the authorization holder is under the *de facto* control of aliens, or that its principals are representives of aliens. *Telemundo, Inc. v. F. C. C.*, 802 F.2d 513, 516 (D.C. Cir. 1986). In considering whether an applicant is alien controlled, notwithstanding numerical compliance with Section 310, the Commission has looked to a number of factors, including the source of funds used to construct and operate the station. *Channel 31, Inc.*, 45 RR 2d 420 (1979). Moreover, there are also conflicting allegations now before us concerning compliance with the percentage limits on alien ownership set out in Section 310. The ambiguities and inconsistencies in PPTV's statements make resolution of these factual matters raised by the petitioners impossible at this stage of the proceedings. Therefore, we conclude that further inquiry at an evidentiary hearing is required.

THE INFORMAL OBJECTION

39. As noted previously, on January 27, 1987, PPTV filed an application on FCC Form 701 requesting an extension of time to complete construction of the station, and on March 16, 1987, PPTV informed the Commission that KPST-TV began operating pursuant to program test authority. It also stated that on March 4, 1987, the station began originating all of its nonnetwork programming from a temporary main studio in Vallejo. Shortly thereafter, PPTV submitted the above-captioned application to cover the construction of its facilities. The petitioners filed an informal objection, alleging that, for the reasons specified in their petition against the transfer application, PPTV was not qualified and had failed to construct the station consistent with the terms of its permit. They argue that the permit specifies that the facilities be completed by February 26, 1987, including the construction of a main studio in the community of license. They assert, however, that PPTV's claimed studio differs substantially from the permanent facility it represented would be built and, in any event, such construction was not completed until March 4, 1987, after the deadline imposed by the construction permit. As such, they maintain that PPTV's license application is patently defective and should be dismissed, and that the Commission should revoke or suspend the station's program test authority pursuant to Section 73.1620(b) of the Rules. In an opposition pleading, PPTV contends that because it filed a timely application for an extension of that construction permit tolling its expiration date, and has, in fact, completed expeditiously all necessary construction, KPST-TV is entitled to be licensed.

40. *Discussion.* We believe that PPTV has complied with our current requirements concerning the station's facilities. Nevertheless, on the basis of the matters raised in the petition to deny the transfer application, which came to our attention after the grant of the construction permit, we are unable to conclude that PPTV possesses the basic qualifications to be or remain a Commission license. Therefore, on the basis of the foregoing, we are unable to make the required finding that the public interest will be served by granting either, or both, captioned applications. Accordingly, we will designate the license application for hearing to determine, pursuant to Section 319(c) of the Communications Act, whether the public interest, convenience and necessity will be served by the grant of that application. Moreover, we will consolidate in that proceeding the transfer application to determine, pursuant to Section 309(e) of the Communications Act and in light the evidence to be adduced at hearing, whether the public interest, convenience and necessity will be served by the grant of that application.

ORDERS

41. Accordingly, IT IS ORDERED, That the petition to deny and informal objection filed by John S. Wong and Pen Holdings, Inc. ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects.

42. IT IS FURTHER ORDERED, That, pursuant to Sections 309(e) and 319(c) of the Communications Act of 1934, as amended, the license and transfer of control applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(a) To determine whether Pan Pacific Television, Inc. is owned or controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.

(b) To determine, whether Pan Pacific Television, Inc. made misrepresentations, or was lacking in candor, by failing to disclose the participation of aliens or their representatives in the acquisition of the permit for, or in the construction and operation of, Station KPST-TV.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Pan Pacific Television, Inc. possesses the basic qualifications to be a Commission licensee.

(d) To determine, in light of the evidence adduced pursuant to the foregoing issues, and pursuant to Sections 309(e) and 319(c) of the Communications Act of 1934, as amended, whether the grant of the captioned applications will serve the public interest, convenience and necessity.

43. IT IS FURTHER ORDERED, That the petitioners and objectors, John S. Wong and Pen Holdings, Inc. ARE MADE PARTIES RESPONDENT to this proceeding with respect to the above issues.

44. IT IS FURTHER ORDERED, That the initial introduction of evidence shall be on John S. Wong and Pen Holdings, and that the applicants shall then introduce their evidence and have the burden of proof with respect to all issues.

45. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the parties herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within twenty (20) days of the mailing of this *Order*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified herein.

46. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

47. IT IS FURTHER ORDERED, That the Secretary, shall send copies of this *Order*, Certified Mail-Return Receipt Requested, to the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In the petition to deny, Mr. Wong is identified as a resident of Fremont, California, a community within KPST-TV's service area and a member of that area's Chinese-American community to which PPTV represented would be specifically served by its station's programming. Pen Holdings, Inc. (Pen Holdings) is a corporation whose President, Eddie Pen, is also a Chinese-American who "shares Mr. Wong's concern for the need for the programming promised by [PPTV]." In fact, Mr. Pen was an unsuccessful suitor for the KPST-TV construction permit, and it was his effort to acquire that permit that forms the basis of most of the allegations now before the Commission. Although PPTV challenges the petitioners' standing, we believe that, in the exercise of our discretion, the matters raised should, and will, be addressed herein.

[2] *Order*, FCC 84M-2681, released June 13, 1984.

[3] In pertinent part, Section 310(b) of the Act states:

> No broadcast . . . station license shall be granted to or held by - (1) any alien or the representative of any alien . . . [or] (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representives. . . .

[4] FCC 84M-2681, at p. 2. The evidence proffered to the ALJ included an affidavit of a former TTV employee who told of TTV's desire and confidential efforts to establish a television station in the San Francisco area. Additional evidence included the translation of part of the official record of the Republic of China legislature for May 18, 1983, consisting of an inquiry made

by a legislator as to whether TTV was planning a television station in Vallejo, had set up and capitalized PPTV, and placed David Li, a PPTV principal and former TTV employee, in charge of the venture.

[5] FCC 84D-81, at p. 5.

[6] *Id.*, at p. 6.

[7] PPTV also signed a television affiliation agreement with HSN to carry HSN programming over KPST-TV during the period before Silver King obtains control of the station. In addition, PPTV reported that it had obtained a 350,000 dollar loan from HSN in order to continue purchasing equipment for the station. PPTV's obligation on that loan, however, may later be assumed by Silver King as part of the consideration paid for the station, because the agreement between the parties requires Silver King to assume all liabilities of PPTV.

[8] Section 73.3597(c)(1)(i) defines an "unbuilt station" as a broadcast station for which a construction permit is outstanding, and, regardless of the stage of physical completion, as to which program tests have not commenced or, if required, been authorized.

[9] In this regard, the petitioners assert that the role of Silver King and HSN in the construction and operation of KPST-TV indicates that the PPTV shareholders have impermissibly and prematurely transferred control of the station to them in violation of Section 310(d) of the Communications Act of 1934, as amended. Their allegations are identical to those raised in Pen Holdings' informal objection to PPTV's September 1986 STA request. They add that when the station subsequently went on the air, PPTV and HSN issued a press release announcing the provision of HSN programming, under an interim affiliation agreement, until the proposed transfer is approved. That fact, however, alone or in conjunction with the matters reviewed and explained in the staff's November 17, 1986 decision, fails to warrant a conclusion that there has been an unauthorized transfer of control of KPST-TV to either Silver King or HSN.

[10] According to PPTV, these include a weekly half hour program, "Eye on Vallejo," which it states is addressed exclusively to issues of importance to citizens of Vallejo; more than six additional hours of public affairs programs per week; public service announcements broadcast during some of the periods available to KPST-TV under the terms of its affiliation agreement with HSN; and three hours per week of Chinese programming. Further, it states that in order to make the community aware of its public service programming, it has placed advertisements in Vallejo media, including the local Chinese language press.

[11] Mr. Pen relates that in the Spring of 1986, he was contacted by PPTV principal Li regarding the availability of the KPST-TV permit and PPTV's desire to sell it to someone who would construct the station and offer Chinese-American programming. He avers that after initially rejecting PPTV's proposal, he was contacted by, and subsequently met with, TTV President Stone Shih in Taipei while on business. At that meeting, according to Mr. Pen, Mr. Shih indicated that he represented all PPTV shareholders (including TTV) and it was their common desire that Pen Holdings obtain and construct the station, and air Chinese-American programming. After Mr. Pen became convinced that the project was worthwhile, he states, he agreed to purchase the station subject to certain conditions, including that TTV would: (a) limit its interest in the station to 20 percent (the maximum interest permitted by U.S. law); and (b) make the necessary arrangements so that Taiwan's three television networks would provide programming of interest to Chinese-Americans for broadcast over KPST-TV. Mr. Pen further avers that thereafter, he was contacted by another TTV official who informed him that the proposal would be acceptable to PPTV. However, a short time later, that official informed Mr. Pen that he had learned of Silver King's offer to purchase KPST-TV, and that if Pen Holdings were to acquire the station, it must "move fast." Mr. Pen relates that when he asked Mr. Shih about this, he was told not to worry as PPTV had already agreed to accept Pen's offer. At this point, the parties agreed to meet in San Francisco on August 1, 1986, to review financial and corporate records and, if acceptable, to sign a purchase agreement for the station.

[12] Mr. Pen declares that, according to the TTV officials, the ownership interests of the transferring shareholders were even lower before the KPST-TV construction permit was granted, but afterwards, TTV increased those interests to their present levels "to reward them for their successful efforts before the Commission."

[13] The petitioners note that the stock purchase agreement between PPTV and Silver King acknowledges that the station equipment is subject to that bank's security interest to secure a3.8 million line of credit to PPTV.

[14] Chairman Hsu does state, however, that his grandson, Emmet, was employed by KPST-TV for one year following his graduation from college.

[15] In his declaration, Chairman Hsu avers that while he did not personally guarantee any loans by ICBC to PPTV, he did receive a call from the bank asking him to provide a reference when the permittee applied for the loan. He relates that he recommended that the loan be approved, informing the bank that TTV would provide free programming materials to the station during its start-up period. Further, he states that he told the bank that he had assisted PPTV in negotiating for an equipment package at the lowest possible price, expressing his opinion that the difference between the sales price and retail price of the equipment should provide the bank with adequate security for the loan.

[16] In fact, the petitioners point to the declaration of PPTV principal Edward Lau, submitted with PPTV's opposition pleading, wherein he states that he was told by Mr. Shih that he had met with Mr. Pen that day, but that he had been unable to persuade Mr. Pen to make an offer, competitive with that of Silver King, for the KPST-TV permit.

[17] The petitioners reject PPTV's position that its argument is illogical and internally inconsistent because if, as claimed, TTV actually controlled PPTV, it could have ordered the sale of KPST-TV to Pen Holdings. They maintain that Pen Holdings would have needed to purchase at least 80 percent of PPTV's stock in order to consolidate, for tax purposes, expected losses from KPST-TV with gains from other business interests. They assert that merely acquiring TTV's alleged 72.2 percent interest in PPTV would not have been sufficient to achieve that purpose. Of more significance, according to the petitioners, is that TTV could not have sold KPST-TV to Pen Holdings without the approval of the PPTV shareholders of record. The petitioners believe that, tempted by Silver King's offer, the transferring shareholders "apparently broke ranks with their Taiwanese benefactors at TTV."

[18] In support, the petitioners submit a translation (from Chinese) of what is termed a balance sheet contained in a 1985 prospectus prepared by Shihlin, which lists among "guarantees for affiliates made by the company" a 153 million Taiwan dollar (roughly equivalent to 3.8 million U.S. dollars at the time of the loan) to PPTV.

[19] With respect to Emmet Hsu, the petitioners note that in a workers compensation and employers liability insurance policy issued to PPTV, Emmet Hsu was identified as Treasurer of the permittee, and excluded from such coverage by virtue of being an

officer of the company. The petitioners note that the sole ownership report filed by PPTV fails to list Mr. Hsu or anyone else as treasurer.

[20] The petitioners do not, however, give the source of that document. However, it appears that the document in question was contained in a "Statement of Short-Term Loan" included in a PPTV financial report prepared by TTV and given to Mr. Pen at, or after, the August 1, 1986 meeting.

[21] On November 3, 1987, PPTV amended the transfer application to report that Mr. Lau, who serves as PPTV's corporate attorney, had been elected Vice President and a director of the permittee.

[22] Mr. Lau states that in 1986, the transferring shareholders collectively contributed 425,000 dollars to PPTV, which came from personal and family funds and the escrow deposit it received from Silver King, the proposed transferee.

[23] Mr. Lau states that the division of the 941,000 dollar obligation into 866,000 in cash and 75,000 in services was explicitly noted in a letter to Chairman Hsu written in September, 1985.

[24] Mr. Lau relates that NEC representatives had come to the United States to negotiate the sale of the transmitter to PPTV. He states that he understood NEC to be a part owner of Shihlin and TTV, and that TTV Chairman Hsu came with its representatives "to assist in the transaction, which was important to NEC because it was then trying to establish a presence in the United States market." When NEC insisted that PPTV make a 100,000 dollar down payment, Chairman Hsu arranged a short-term loan because PPTV "did not have that much on hand at that time."

[25] Mr. Mo, according to the petitioners, was another significant TTV official who participated in numerous discussions with Pen Holdings regarding the purchase of KPST-TV, including the August 1, 1986, meeting in San Francisco that form most of the petitioners' allegations.

[26] In addition, Mr. Lau states that the PPTV records reviewed by Messrs. Shih and Mo reflected a 5,000 dollar short-term loan from PPTV to TTV/America "at a time when [it] was temporarily short of funds," which was repaid sixteen days later.

[27] Specifically, the petitioners state that their reply directly responds to statements made in PPTV's opposition, including that there was no August 1, 1986, meeting in San Francisco, and that neither TTV nor Emmet Hsu (or members of his family) have an interest in PPTV. Moreover, as to the alleged role of Emmet Hsu in the permittee, the petitioners submit copies of three applications for microwave facilities for KPST-TV, which were filed with the Commission on November 5, 1985. They argue that these documents indicate that Emmet Hsu believed that he was an officer of PPTV, having signed those applications as an "Officer and Member" of the permittee. The petitioners do note that almost two months later, PPTV filed an amendment representing that Mr. Hsu "inadvertently" signed the applications.

[28] We recognize that there is a question as to whether some of the petitioners' allegations meet statutory pleading standards. *See* 47 U.S.C. 309(d)(1). We note however, that these allegations are based on statements made to Pen Holdings representatives and are purportedly based on their contemporaneous notes. Nevertheless, in view of other properly supported matters in this case, the public interest requires further exploration of these issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PRESS BROADCASTING
COMPANY
(Assignor)

and

SILVER KING BROADCASTING
OF VINELAND, INC.
(Assignee) File No. BALCT-860819KR

For Assignment of the License of
UHF Television Station WHSP-TV
Vineland, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1988; Released: November 15, 1988

By the Commission:

1. On December 22, 1986, the Commission granted the above-captioned application to assign the license for station WHSP-TV (formerly WSJT-TV), Vineland, New Jersey from Press Broadcasting Company to Silver King Broadcasting of Vineland, Inc. (Silver King). *Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986). The parent of Silver King, Home Shopping Network, Inc., already owned station WWHT(TV), Newark, New Jersey, through another subsidiary. The Commission waived its "duopoly" rule in conjunction with its approval of the assignment of WHSP-TV.[1] The Commission here considers a petition for reconsideration of that action, filed on behalf of the Office of Communication of the United Church of Christ, Action for Children's Television, the NOW Legal Defense and Education Fund, Professor Robert Lewis Shayon, and Leon Lazarus (hereinafter collectively referred to as "petitioners"), an opposition filed by Silver King and a reply by petitioners.

STANDING

2. Petitioners did not interpose an objection to the assignment application at any time prior to its grant. In order to now request reconsideration of that action, petitioners must "state with particularity the manner in which [their] interests are adversely affected by the action taken, and . . . show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1).

3. Petitioners contend that the facts and arguments upon which their petition for reconsideration is based did not crystallize until after the period allotted for petitions to deny had expired. They argue that the Commission effected a new standard for considering assignment applications in a decision which it rendered on November 6, 1986, and that the actual programming which exemplified the Commission mistake in relying on Silver King's programming representations in granting the duopoly waiver was not discoverable until after the transaction was consummated and the new licensee began to operate.

4. The November 6 decision to which the petitioners refer was the grant of other assignment applications to Silver King, but which did not involve the duopoly rule.[2] Petitioners argue that until the November 6, 1986 ruling they did not believe that the Commission would grant an application which contained "essentially no information sufficient to allow an evaluation of an applicant's program proposal." Petition at 3. Only then did they decide that they needed to file a petition to deny to prevent the subject transaction. However, in that case the Commission simply approved a transfer on the basis of a programming proposal which complied in all respects with the requirements set out in *Report and Order* in MM Docket No. 83-670 (*TV Deregulation*), 98 FCC2d 1076 (1984).[3] There was nothing new or novel in the November 6 assignment decision. Moreover, petitioners then waited two and one half months to oppose the subject transaction. It would be difficult to consider this prompt action even if there were a legitimate reason for not filing timely.[4]

5. In this light, petitioners' first position essentially resembles a protestation that they were surprised by the Commission's decision to waive the duopoly rule on the basis of the record at hand. This is no basis for a new party to file a petition for reconsideration. Interested parties must timely file a petition to deny any application they oppose and record their opposition, and the reasons for that opposition, however remote they perceive the chances that the application would be granted. In *Simon Geller (WCVA - FM)*, 91 FCC2d 1253 (1982), the Commission denied a new party status to file a petition for reconsideration over petitioner's specific complaint that it did not come forward earlier because it had been confident of a Commission decision in favor of its position. In affirming the Commission's decision the Court of Appeals remarked that "if we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission's - and indeed the public's - interest in finality of licensing decisions would be eviscerated." *Committee for Community Access v. F.C.C.*, 737 F.2d 74, 84 (D.C. Cir. 1984). In another case similar to that here, a new party petitioning for reconsideration argued that the Order it wished reconsidered had signaled a "significant change in Commission policy" and that the "novelty" of the Order could not have been foreseen. Also, the contested Order had relied on another previously issued decision which was still subject to its own petitions for reconsideration. The Commission determined that these circumstances did not justify the party's failure to enter the proceeding earlier, and denied its request for reconsideration. *Concord Telephone Exchange, Inc.*, 56 RR2d 653 (1984). Furthermore, that case and others have also stated that even where the prior involvement of the petitioner is not an issue "[r]econsideration will not be granted to permit an additional opportunity to present material which continuously has been available." *Id.* at 657. Silver King's proposal and waiver request have been continuously available from the time they were filed.

6. Petitioners' second position, that the programming now offered by Silver King on WHSP-TV demonstrates the inadequacy of its proposal, is equally unavailing. The

waiver was granted on the basis of information before the Commission at the time of consideration. Later discovered information is not relevant if it concerns later events that are not pertinent to the challenged decision. A licensee's activities after receiving authorization are relevant for challenging the incumbent licensee's performance in a variety of venues, *e.g.*, by contesting a renewal application, but the programming delivered does not bear on the reasonableness of this Commission action at the time the assignment and related duopoly waiver were granted.

7. In sum, petitioners have not excused their lack of involvement in this proceeding prior to the Commission action granting the assignment application. For this reason the petition for reconsideration will be dismissed. Nonetheless in an effort to clarify apparently remaining misconceptions, some points raised by petitioners will be addressed briefly below.

8. Before a duopoly waiver can be granted, an applicant must show that the benefits to be achieved by its proposal outweigh any detrimental effects of the signal overlap. *Capital Cities Communications, Inc. (Capital Cities)*, 59 RR2d 451 (1985). Petitioners have argued that the programming statement in Silver King's assignment application was too brief and generalized to provide a basis upon which to examine the benefits represented by Silver King's proposal so that they can be weighed. In so doing, however, petitioners mistakenly ignore the rest of the duopoly waiver equation, which includes a number of benefit and detriment factors. For instance, in balancing the factors involved in granting this assignment application, the Commission found little actual detriment resulting from the overlap. It observed that the stations involved serve separate and distinct markets, each with individual local service needs. It also noted that eleven television stations serve the entire Grade B signal overlap area, and thirteen more television stations serve part of it, so that undue concentration of economic power would not result. Thus, the only detriment is a minimal reduction in diversity in an area served by numerous other television stations. The Commission found this readily offset by the potential for strengthening financially weak television outlets in highly competitive markets at the hands of a new owner committed to meeting local needs. It observed that the waiver and assignment grant might provide the only opportunity for the two stations to remain viable and provide local outlets in New Jersey. Thus, in reaching the decision contested here, the Commission did not need to rely on Silver King's programming commitment. Instead, it only observed that the assignee proposed to meet the minimum requirements for any applicant, as set out in *TV Deregulation, supra*, which was adequate in light of the other considerations involved in this case.[5]

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by the Office of Communication of the United Church of Christ, Action for Children's Television, the NOW Legal Defense and Education Fund, Professor Robert Lewis Shayon, and Leon Lazarus IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The duopoly rule prohibits common ownership or control of television stations whose Grade B contours overlap. 47 C.F.R. § 73.3555(a)(3). The signals of WHSP-TV and WWHT(TV) share a Grade B contour overlap area of 613 square miles, encompassing 344,458 persons, which is 9.8% of WHSP-TV's Grade B area and 5.7% of its population, and 10.4% of WWHT's Grade B area and 2.2% of its population.

[2] Letter to David Dusef, Esq. from Chief, Video Services Division, November 6, 1987; *review denied, Family Media, Inc.*, FCC 87-122, released May 5, 1987.

[3] *Recon. denied*, 104 FCC2d 357 (1986), *aff'd in relevant part, remanded in part sub nom. Action for Children's Television v. F.C.C.*, 821 F2d 741 (D.C. Cir. 1987).

[4] Petitioners' December 3, 1986, filing of an Emergency Petition for Declaratory Relief, in which it raises its concerns regarding the present programming statement policy, did not constitute an appearance in this or any other application case. (Petitioners' requested relief was denied in *Declaratory Ruling Concerning Programming Information for Broadcast Applications*, FCC 88-237, released September 13, 1988.)

[5] Petitioners argue that if this applicant is granted a duopoly waiver on the basis of a programming commitment that is only standard, any party could be granted a waiver and the duopoly rule is effectively repealed. As explained above, in so arguing, petitioners ignore the variety of other factors involved in considering this and any other duopoly waiver request. Petitioners are correct that parties in like positions must be treated the same; it follows that additional petitions for waiver of the duopoly rule could be granted with similar programming commitments, if the petitioner is also similarly situated in all other respects. The Commission's careful consideration of the totality of circumstances in this case demonstrates its continued adherence to the duopoly rule and its underlying principles. Petitioners specifically compare *Capital Cities, supra*, in which case the Commission waived the duopoly rule despite a large signal overlap area, on the basis of assignee's concrete proposals to expand the physical facilities and resources devoted to New Jersey coverage. Petitioners believe that in the present case, a waiver should not be granted because there is no similar showing. However, the *Capital Cities* case varied from this case in several respects. Significantly, it involved a much greater overlap than is present here, so that there was much more of a detriment to overcome. In this case, the overlap is very small, and the Commission relied on a number of factors to outweigh it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

OLIVER PRODUCTIONS, INC. — 8330-RB, C11-26

For Declaratory Ruling

STAFF RULING

Adopted: November 3, 1988; Released: November 4, 1988

By the Chief, Mass Media Bureau:

1. The Commission has before it an October 25, 1988, request, supplemented November 1, 1988, for declaratory ruling that segments of "The John McLaughlin Group" (JMG) are exempt as "bona fide newscasts" from the "equal opportunities" provision in Section 315 of the Communications Act [47 U.S.C. Section 315(a)(1)].

2. According to the request, JMG typically comprises four to six "news reporting segments" during which the host, John McLaughlin, "literally 'reads' the news in the same way that other television newsmen and newswomen deliver the news to their audiences." The request continues that "Mr. McLaughlin's reports are accompanied by video tape features, secured from various news organizations, that serve to illustrate and illuminate the news story." The news clips are produced by the commercial broadcasting networks as well as PBS and CNN, and "in many cases, [are] also aired on the newscasts of the originating network." After each "news reporting segment" McLaughlin initiates discussion of the particular story by asking a question of a JMG panelist. After the conclusion of the panel discussion, another "news reporting segment" is aired, followed by related panel discussion. The request seeks exemption only for the news reporting segments, but not for the panel participation.

DISCUSSION

3. In 1959, Congress amended the Communications Act to exempt from the equal opportunities provision of Section 315 appearances by legally qualified candidates during the following four categories of bona fide news programming:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). Congress removed the inhibiting effect of the equal opportunities obligation upon bona fide news programming to encourage increased news coverage of political campaign activity. Rather than define precisely what it meant by "news", Congress chose to leave the task of interpreting the scope of each exemption to the Commission. *See* 105 Cong. Rec. 16227 (1959)(Rep. Celler); 105 Cong. Rec. 14455 (1959)(Sen. Pastore). Furthermore, Congress did not specify the format characteristics it envisioned for the bona fide newscast exemption. Congress indicated, however, that the common characteristic of all of the news exemptions is "bona fide news value." Conf. Rep. No. 1069, 86th Cong., 1st Sess. at 4 (1959); 105 Cong. Rec. 14442 (Sen. Pastore). Indeed, Congress qualified each exemption with the term "bona fide" which the legislative history demonstrates was intended to emphasize that bona fide news programming be genuine and not designed for the purpose of advancing or harming any particular candidacies. *See* 105 Cong. Rec. 17782 (1959).

4. The Commission has had only two occasions to rule whether specific programs could be treated as newscasts. *Paramount Pictures Corp.*, 64 RR 2d 600 (M.M.Bur. 1988)("Entertainment Tonight" and "Entertainment This Week"); *Rev. Donald L. Lanier*, 37 FCC 2d 952 (B/c Bur. 1972)(The Church Today). In ruling that "Entertainment Tonight" and "Entertainment This Week" were bona fide newscasts the Commission, through its Mass Media Bureau, stated that in terms of format the principal consideration should be "whether the program reports news of some area of current events . . . in a manner similar to more traditional newscasts." 64 RR 2d at 601.

5. The Commission has on several occasions granted news exemptions to "bona fide news interview" segments of certain programs. *See Multimedia Entertainment Inc.*, 56 RR 2d 143, 148 (1984) (Donahue); *CBS, Inc.*, 63 RR 2d 483, 484-85 (M.M.Bur. 1987) (The Morning Program); *CBS, Inc.*, 55 RR 2d 864, 865 (M.M.Bur. 1984) (The American Parade). In these instances, the exemption applied only to "bona fide news interview" segments of the programs. Although, to date, the Commission has not exempted "newscast" segments of otherwise nonexempt programs, the rationale for such exemption is the same. Indeed, the Commission has recognized in applying Section 315 that programs may include various segments, including exempt news segments. *See ABC, Inc.*, 46 RR 2d 1205 (1980) (Good Morning America); *Lar Daly*, 40 FCC 314 (1960) (Today). Here, the segments for which JMG seeks exemptions, although brief, are apparently no more than the reports of current news stories which serve as the bases of subsequent panel discussions. As long as these segments are clearly demarcated, we can ascertain no reason to treat such segments during JMG any differently from other newscast reporting. Finally, we have no information before us to suggest that the purpose of JMG is to advance or harm any candidacies.

6. Accordingly, in light of the absence of any evidence of bad faith or unreasonableness, appearances by legally qualified candidates during the above-described newscast segments of "The John McLaughlin Group" should be accorded the bona fide newscast exemption. We believe this conclusion is fully consistent with the statutory objective of the Section 315 exemptions -- to enhance news coverage of the political arena.

7. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS
COMPANY,
Complainant,

v. File No. E-87-33

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: October 26, 1988; Released: November 15, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a Joint Motion filed on October 14, 1988, by US Sprint Communications Company (US Sprint) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss in part the above-captioned proceeding and authorize the parties' agreement to settle certain issues raised in the matter. For the reasons set forth below, the Joint Motion is granted.

2. This proceeding was initiated by a formal complaint filed by US Sprint against AT&T on January 2, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT&T*, DA-88-462 (released April 13, 1988). On May 16, 1988, US Sprint filed an Application for Review of the Bureau's order. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a partial settlement that resolves all issues with respect to AT&T's 56 kbps DDS rates for the period January 2, 1985 to the date of the settlement agreement, while leaving open the pending application for review on the statute of limitations issue for the period prior to January 2, 1985.

3. US Sprint and AT&T state that dismissal of the complaint will affect no other party and will serve the public interest by eliminating the need for further litigation of significant issues raised by the complaint.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy concerning AT&T's 56 kbps rates for the period January 2, 1985 through the date of the parties' settlement agreement and that proceedings with respect to such issues should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaint in Part filed by US Sprint Communications Company and American Telephone and Telegraph Company IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE in the manner and to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of
B & L COMMUNICATIONS, INC. File No. 597588-YX

Application to use one of
the 150 original 800 MHz
conventional frequency pairs
in a trunked mode of operation

ORDER

Adopted: November 1, 1988; Released: November 15, 1988

By the Chief, Private Radio Bureau:

1. The Chief, Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules, 47 C.F.R. § 90.615, filed by B & L Communications Inc., (B & L). B & L, the licensee of a fully-loaded ten channel trunked SMR system, seeks to expand its system by adding two unused (unlicensed) conventional channels available under Section 90.615 of the Rules. Frequencies available under Section 90.615 may only be used for conventional operations; trunked operation is not permitted. B & L argues that allowing it to add these two conventional frequencies to its trunked system will increase spectrum efficiency and will provide relief to the system's users.

2. We agree with B & L that allowing trunking on these additional channels in these circumstances would increase spectrum efficiency.[1] There are, however, other criteria besides spectrum efficiency that we must consider in deciding upon this request. We must determine whether allowing B & L to add these two unused 800 MHz conventional channels to its existing fully-loaded trunked system would undermine the fundamental purpose of Section 90.615; *i.e.*, whether grant of the requested relief is in the public interest.[2]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire 800 MHz operations but do not require a trunked system. There has, however, been no expression of interest by any other party for the conventional channels requested by B & L. B & L is already operating a fully-loaded trunked system and needs additional capacity.[3] Allowing B & L to increase the capacity of its trunked system through the addition of these two unused frequencies is consistent with the Commission's objective of promoting the development and use of spectrally-efficient technologies to facilitate maximum use of scarce spectrum resources. Such action does not undermine the public policy purpose of Section 90.615, but simply recognizes that allowing B & L to add these unused channels to its trunked system will benefit the public by providing additional capacity to meet the demand for service. Under these circumstances, we conclude that it is in the public interest to allow B & L to use these channels to expand its trunked system, pending the outcome of any further proceedings in PR Docket No. 87-213.

4. Accordingly, B & L's request for waiver of Section 90.615 of the Rules to expand its system by trunking over two unused (unlicensed) conventional channels is granted, pursuant to Section 0.331 of the Rules,[4] subject to B & L's filing of the appropriate frequency coordination documents, and subject also to the outcome of any further proceedings in PR Docket No. 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[5] will remain applicable despite the fact that the frequencies will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] We have initiated an inquiry to determine whether the public interest would be served by permitting trunked operations on the 800 MHz conventional frequencies. *See* Notice of Inquiry, PR Docket No. 87-213, 2 FCC Rcd 3820 (1987). The Commission is currently reviewing the comments and reply comments filed in this proceeding.

[2] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[3] B & L's need for the requested channels is demonstrated by the fact that its system will still be fully loaded even after this expansion.

[4] *See* 47 C.F.R. § 0.331.

[5] *See* 47 C.F.R. § 90.621.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application

David R. Williams, d/b/a INDUSTRIAL COMMUNICATIONS, INC. File No. 24622-CD-P/L-01-87

For Authority to Construct
a new one-way facility
in the Public Land Mobile Service
operating on 152.24 MHz at
Provo, Utah

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1988; Released: November 15, 1988

By the Chief, Mobile Services Division:

1. Daniels & Associates, Inc. d/b/a Interlink Communications of Utah (Interlink) has filed a petition to dismiss or deny the captioned application of David R. Williams d/b/a Industrial Communications, Inc. (Industrial). Industrial requests authority to construct a new one-way facility to operate on frequency 152.24 MHz at Provo, Utah. Responsive pleadings were filed.[1]

2. On August 12, 1987, Interlink filed an application requesting authority to construct an additional facility for Station KRS691 operating on frequency 152.24 MHz at Provo, Utah. The applications of Industrial and Interlink were designated as mutually exclusive by *Public Notice* on January 13, 1988.[2] Interlink has filed a request for comparative hearing pursuant to Section 22.33(c) of the Commission's rules. Responsive pleadings were filed.

BACKGROUND AND CONTENTIONS

3. Interlink's Station KRS691 operates on frequency 152.24 Mhz at Garfield and Ensign Peak, Utah. Interlink argues that Industrial's proposed facility, if approved, will cause harmful interference to its co-channel facilities at Garfield and Ensign Peak. Moreover, Interlink argues that Industrial's proposal misstates the front-to-back power ratio that can be anticipated from the antenna, and is contradicted by the specifications of the manufacturer. [3] Further, Interlink argues, Industrials choice of frequencies violates the Commission allocation policy of Section 22.100(a) of the Commission's rules. In Interlink's view, this policy imposes on applicants the responsibility to select frequencies in a manner that minimizes interference and obtains efficient use of the authorized facilities.

4. In response, Industrial asserts that its proposed antenna system properly depicts operation of its facility, and protects Interlink's facilities from co-channel interference. However, Industrial contends, that Interlink is not entitled to protection from interference in Provo, Utah, which is located eight miles outside of the petitioners service area. Finally, Industrial disputes Interlink's assertion that Industrial's choice of frequency violates the allocation policy of Section 22.100(a) of the rules. Industrial contends that its proposed station will provide valuable and efficient service to the Provo, Utah area.

5. In reply, Interlink argues that Industrial's proposal is based on flawed engineering, is not supported by generally accepted engineering principles concerning the performance of directional antennas, and is contradicted by the manufacturer of the antenna equipment, Decibel Products. Specifically, Interlink asserts that while Industrial's proposal depends upon a front-to-back ratio for its two DB-225 antennas of 42 db, there is evidence provided by Decibel Products that the proposal would at most have a front-to back ratio of 28 db, and submits a radiation pattern from Decibel Products.

6. In response, Industrial contends that although the radiation pattern submitted by Interlink is different from the configuration specified by Industrial in its application, even this antenna pattern demonstrates that the proposed system provides the interference protection required. In reply, Interlink challenges the failure by Industrial to explain why its proposal is inconsistant with the manufacturer's own radiation pattern. In response, Industrial submits a letter from Decibel Products' systems engineer which Industrial contends, supports their assertions that the manufacturer's radiation pattern alone does not fully describe antenna performance, and that the proposed db values could be obtained.

DISCUSSION

7. After careful consideration of the facts and arguments presented, we conclude that the petition to deny should be granted. In cases where there are disputes involving antenna patterns, we rely on the antenna pattern from the manufacturer. *Beep Beep Suncoast*, 3 FCC Rcd 1646 (1988). The manufacturer's pattern is essential in cases where, as here, the actual interference potential of the proposed facility cannot be demonstrated with sufficient accuracy by the applicant or the petitioner. In this case, a manufacturer's pattern for the combined DB-225 antenna has not been provided. Instead, the manufacturer indicates that it "expects" the proposed values could be obtained with field tuning. Interference can result, however, if the constant space and time phasing required for field tuning is disrupted. In view of the uncertainty of obtaining and maintaining the proposed front-to-back ratio, and without actual measured values from the manufacturer, we find that Industrial has not provided the interference-free showing required by Section 22.15 of the rules. Accordingly, we are dismissing Industrial's application.

ORDERING PARAGRAPHS

8. Wherefore, for the foregoing reasons, IT IS HEREBY ORDERED, that the application of Industrial Communications, Inc., File No. 24633-CD-P/L-01-87 IS DISMISSED as defective.

9. IT IS FURTHER ORDERED that the Petition to Deny filed by Interlink Communications of Utah IS GRANTED.

10. IT IS FURTHER ORDERED that the Motion to Designate Applications For Comparative Hearing filed by Industrial Communications Inc., IS DENIED as moot.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The parties have requested permission to file additional pleadings pursuant to Section 1.45(c) of the Commission's rules. Section 1.45, states in its pertinent part, that additional pleadings may be filed only if authorized by the Commission. Because of the nature of the arguments involved, we accept the additional pleadings filed by Industrial and Interlink.

[2] A third application, filed by American Paging, Inc. (API), was also announced mutually exclusive with these applications. API requested dismissal of its application on January 20, 1988.

[3] The Industrial application proposes a combined use of two Decibel Products Inc. (Decibel Products), DB-225 antennas.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-24

In the Matter of

Amendment of Parts 73 and 76
of the Commission's Rules
Relating to Program Exclusivity
in the Cable and Broadcast Industries

ERRATUM

Released: November 15, 1988

1. On October 13, 1988, the Commission adopted a *Further Notice of Proposed Rule Making*, FCC 88-322, in the above-captioned proceeding. This *Further Notice* addresses possible changes in a number of rules relating to the ability of television broadcasters to obtain exclusive rights in the programming they purchase *vis - a - vis* cable television systems carrying distant broadcast signals and against other television broadcast stations.

2. Paragraph 43 of this *Further Notice* incorrectly indicated that the non-network territorial exclusivity rule set forth in Section 73.658(m) applied to both commercial and noncommercial stations. Note 3 at the end of Section 73.658 specifies that the non-network exclusivity rule is presently limited in its applications to commercial stations. Commenting parties should also be aware, in connection with the discussion in paragraph 44 relating to low power television stations, of Section 74.780 of the low power station rules which cross-references Section 73.658.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 15, 1988

NYNEX TELEPHONE COMPANIES FILE
REVISIONS TO COST MANUAL
PUBLIC COMMENT INVITED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required certain telephone companies to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. Accordingly, NYNEX filed its cost allocation manual on August 14, 1987. In the *NYNEX Order*, the Common Carrier Bureau conditionally approved the NYNEX manual subject to the filing of numerous revisions and required NYNEX to periodically update its manual as required. *See NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 81 (1988). NYNEX must submit proposed revisions to the manual at least 60 days prior to implementation if the revisions change the cost categories and their allocation mechanisms, or change the way that employee time is allocated. The Bureau stated that the public will be afforded an opportunity to comment on revisions of this nature. NYNEX filed revisions on March 14, 1988, and on August 23, 1988. In a *Memorandum Opinion and Order*, released October 11, 1988, the Chief, Common Carrier Bureau, reviewed the contents of NYNEX's revised manual and found, subject to certain exceptions, that these revisions properly implemented the *NYNEX Order*. *See NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, DA 88-1548, released October 11, 1988.

On October 25, 1988, NYNEX filed proposed changes in the section of its manual that describes the cost categories and allocation mechanisms. NYNEX proposes the addition of directly assignable cost pools, and the disaggregation of combined account cost pools. NYNEX also proposes a change in the cost allocation methodology of Account 6623, Customer Services Expense, required by the October 11, 1988, *Memorandum Opinion and Order*.

Parties may file comments on the proposed revisions to the cost manual no later than **December 1, 1988.** Replies should be filed by **December 16, 1988.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. 2100 M Street, N. W., Washington, D. C. 20036.

Copies of the revisions may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washignton, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-505

In the Matter of

National Security Emergency
Preparedness Telecommunications
Service Priority System

REPORT AND ORDER

Adopted: October 27, 1988; Released: November 17, 1988

By the Commission:

1. INTRODUCTION

1. By our Notice of Proposed Rule Making (NPRM) in Gen. Docket No. 87-505, 2 FCC Rcd 7124 (1987), we proposed revisions to Sections 64.401 and 64.402 (and Appendices A and B thereto) of the Commission's Rules and Regulations, 47 C.F.R. §§ 64.401, 64.402, which dictate the procedures for the restoration of vital private line services during emergency situations and establish a "Precedence System for Public Correspondence Services." The proceeding was initiated by the Secretary of Defense in his capacity as the Executive Agent for the National Communications System (NCS).[1] By its petition, NCS proposed to replace the existing Restoration Priority rules with a new National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System, which has a broader scope and applicability. NCS argued that adoption of the rules is necessary to "(1) authorize and require telecommunications service vendors to provide priority treatment to NSEP telecommunication services, (2) ensure such vendors are not in violation of the Communications Act of 1934 when doing so (i.e., not engaging in any unlawful discrimination or undue preference), and (3) override any existing contractual provisions inconsistent with the rules promulgated." The appendix to our NPRM essentially reflected the proposal submitted by NCS.[2] Twenty five parties filed comments and fourteen parties submitted replies.[3]

II. BACKGROUND

2. In 1967, the Commission, in conjunction with the Director of Telecommunications Management, Office of Telecommunications Policy [now merged with the Office of Science and Technology Policy], adopted rules establishing a system of priorities applicable to leased intercity private line services.[4] These rules, contained in Part 64 of the Commission's Rules and known as the Restoration Priority (RP) System, were promulgated to ensure that services "vital to the national interest [would] be maintained, to the maximum extent possible, during emergency service." The rules are effective until superseded by the President's powers under Section 706 of the Communications Act.[5] The general purpose of the RP System is to give private lines vital to the national security a designation to signify that those lines should be given priority restoration when a failure occurs. When lines carrying an RP designation fail, carriers are authorized and required to interrupt either lower or non-priority private line services or public switched network services to restore lines with the RP designation if spare circuits are unavailable. To obtain an RP designation, a user must submit a request to the NCS or the FCC.[6] When the NCS receives a request, it recommends an RP designation to the FCC for final approval. Carriers are directed to treat the NCS designation as an interim FCC certification prior to formal FCC approval. As a general matter, RP designations are valid for three years. Under the RP System, there are four priority categories for private lines. The highest level is reserved for federal and foreign government services used to support national survival if attack occurs. The second level, applicable to the same entities as the first level, is for services that are essential when attack threatens. These would be used, for example, to enhance the preparedness of U.S. military forces or the ability to conduct diplomatic efforts to reduce the threat of war. The third level is applicable to government and non-government services needed to maintain vital defense and diplomatic, and health and safety functions during a major disaster or other emergency. The last priority is applicable to lines needed to continue or reestablish important financial, economic, health and safety activities during emergencies.

III. THE PETITION

3. In its petition, NCS stated that the RP System does not fully address today's needs for priority treatment of NSEP telecommunications service and that a new TSP System is necessary. It offered three reasons. First, it noted that the RP System does not cover the expedited provisioning of new NSEP service.[7] Second, it argued that the RP System, which applies only to the restoration of intercity private lines, cannot provide as much support to NSEP needs as the TSP System which covers all NSEP private lines and includes the capacity and ubiquity of the public switched network. In this regard it explained that a key element of national security strategy is ensuring a survivable telecommunications infrastructure and that such a structure must include intracity private lines and the vast resources of the public switched telecommunications networks. It also noted that the federal government continually has been expanding its reliance upon public switched networks to meet NSEP needs.[8] Finally, it stated that the management of the RP System has been flawed and that the TSP System has been designed to remedy the current problems. NCS noted, for example, that there are "insurmountable discrepancies" in the NCS, FCC and carrier data bases of RP circuits. Another problem it discussed related to a lack of specific guidelines limiting the number of circuits that qualify for each priority category. This, it said, has resulted in a concentration of circuits in the higher priority categories. NCS concluded that such a concentration results in a less meaningful priority system. To correct these problems the TSP System it proposed would include procedures to ensure an accurate data base (e.g., periodic audits, revalidation of all priorities every three years) and establishment of percentage guidelines on the number of NSEP services that may qualify for each of

the restoration priority levels so that only a relatively small number of services will receive "top priority" treatment.[9]

4. By NCS' proposal, the Commission's rules would be applicable in all circumstances except when the President invokes the war emergency powers contained in Section 706 of the Communications Act, 47 U.S.C. § 706. The Commission's rules, together with regulations adopted by the EOP, are intended to establish a uniform system of priorities for provisioning and restoration of NSEP telecommunications services both before and after invocation of the President's war emergency powers. The proposal included for the first time a definition of "NSEP Telecommunications", and set forth services eligible for priority treatment. *See* NPRM at paras. 12-17.

IV. DISCUSSION

5. The NRPM itself sought comment on three focal issues: (1) the applicability of the proposed rules to intrastate services and their underlying facilities and the applicability of the rules to switched services, (2) the extent to which the proposal over-delegates authority from the FCC to the EOP in the process of priority application and assignment, and (3) the means by which carriers may recover their TSP-related expenses. A broad range of additional issues were also raised in the NRPM, and the commenting parties offered suggestions and views on these and other matters. The Appendix to the NRPM contains the Commission's proposals in response to NCS' petition, and the Appendix to this document reflects our final resolution on each of the matters discussed below.

6. *Jurisdiction*. As noted in the NPRM, the Commission is charged with promoting the safety of life and property and with ensuring effective communications for "the purpose of the national defense." 47 U.S.C. § 151. We also noted that all provisions of the Act must be read in light of that statement of purpose, and that we have often been required to consider national security issues in our orders, *e.g.*, AT&T (Divestiture Order), 98 F.C.C. 2d 141 (1983). We stated that we have consistently sought to balance the needs of NSEP interests with the needs of the general public in ensuring efficient service at a reasonable cost. We also stated that "national security" should be the basis for giving priority treatment to one segment of telecommunications users over another only when absolutely necessary, and that our policy under the RP System has been that prior to preempting any public switched network services to restore a private line service carriers should "insure that a sufficient number of public switched network services will remain available for public use." NPRM at para. 19. With these concerns in mind, we sought comment on the applicability of the proposed rules to intrastate services and their underlying facilities, and the applicability of the rules to switched services. We will first address the matter of the Commission's jurisdiction over intrastate services under TSP.

7. We stated in the NPRM that notwithstanding Section 2(b) of the Act, 47 U.S.C. § 152(b), our national security responsibilities under Section 1 of the Act gives this Commission the authority to include intrastate services that have an NSEP function in the TSP rules. We noted that, in any case, this Commission has jurisdiction over physically intrastate lines that carry interstate traffic.[10] We sought comment on whether we also have jurisdiction based solely on a national defense analysis and asked whether, for example, the fact that such services are necessary for national security purposes as demonstrated by their role in national defense and in promoting the safety of life and property -- a purpose for which this Commission was created [47 U.S.C. § 151] -- gives us jurisdiction to preempt conflicting state restoration and provisioning programs. We also requested parties to comment on any practical problems they foresee with the inclusion or exclusion of intrastate services and their underlying facilities in the implementation of the TSP System.

8. AAR states that any practical problems with inclusion of intrastate services and their underlying facilities in TSP would be minimal when compared to the advantages of having a single set of rules on a national basis. AICC interprets Section 1 of the Act as giving authority to the FCC to include intrastate services that have an NSEP function in the TSP rules. Centel concludes simply that it is incumbent on the FCC to take preemptive action over intrastate facilities. For its part, GTE urges that intrastate services be included in TSP. However, it argues that TSP should not involve restoration of intrastate switched services, only their provisioning. It notes that Section 1 of the Act supports FCC jurisdiction over intrastate services, especially in cases where it is not possible to separate the interstate and intrastate components. It states that 911 and other local systems can be handled under the federal priority system. McCaw also supports FCC action preempting conflicting state priority systems. Otherwise, it says, up to 51 conflicting priority systems may exist. It too believes Section 1 of the Act supports exercise of jurisdiction by the Commission. Pacific Bell states that Congress has declared that national defense is one of the purposes of the Act so that the FCC should set national priorities for NSEP services. Southwestern Bell states that there is no need to confront the intrastate issue because the practicalities of restoration will show that nobody benefits from litigating the jurisdictional issue. It believes that the potential problem is one of the volume of requests that will be submitted, though it suggests that if NCS cannot handle the large number of facilities included under TSP the states will proceed independently or FEMA [Federal Emergency Management Agency] and others will help. Telocator supports FCC jurisdiction over intrastate services, based on promotion of safety of life and property and national defense arguments. The FCC must preempt conflicting state priority provisioning and/or restoration programs that could potentially affect those lines; otherwise, transition to wartime or response to disasters would be difficult. Like McCaw, it views separate state NSEP programs as precluding the effective implementation of the federal TSP System. Similarly, USTA states that two systems, state and federal, would be inherently less effective than one. It urges that no state plan should be permitted to conflict with the TSP System. Teltec supports preemption based on traditional jurisdiction over intrastate lines that carry interstate traffic.

9. UTC favors preemption of intrastate services to which priority levels are assigned under TSP rules. It supports Section 1 as the appropriate source of authority. Citing *Florida Lime and Avocado Growers, Inc. v Paul*, 373 U.S. 131, 143-44 (1963), *Northern States Power Co. v State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), and *Louisiana Public Service Comm'n v FCC*, 106 S.Ct. 1890, 1898 (1987), [476 U.S. 355] UTC states that it is a well-established principle that federal preemption of state regulation is appropriate where the nature of the subject

matter regulated is one which demands exclusive federal regulation in order to achieve uniformity vital to national interest or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress. It urges that Section 2(b) of the Act does not preclude the FCC from preempting conflicting state restoration programs and claims that Section 2(b) was enacted "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *North Carolina Utilities Commission v FCC*, (NCUC) 537 F.2d 787, 794, n.6 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976). It also notes that Section 202(b) of the Act authorizes FCC jurisdiction where there are inconsistent state restoration programs or where there are facilities connected to radio facilities. *Capital City Telephone*, 3 FCC 189, 194 (1936).

10. In contrast, MCI argues that Section 1 of the Act does not constitute an independent ground for agency authority, that Section 2 of the Act gives the FCC jurisdiction over intrastate facilities only to the extent they are used for interstate communications. It cites *Sierra Club v Lynn*, 501 F.2d 43, 55 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975), and *Louisiana PSC*, *supra*, for support of the argument that statements of purpose, e.g., in the preamble of a statute, "operate only as guideposts to informed [agency] discretion." It urges the Commission to cooperate with states in adopting a program comparable to TSP. NARUC states that the national defense cannot be used as the justification for FCC jurisdiction over intrastate services and underlying facilities, though it agrees that dual regulation of TSP is not well advised. It suggests a federal-state board under Section 410(c) of the Act to assure uniform nationwide implementation, or, as an alternative, subjecting the TSP to triennial review by a board of state commissioners. For its part, NTCA notes that Section 1 of the Act does not provide a basis for ignoring specific limits on the FCC's authority under Section 2(b)(2), citing *Louisiana PSC*, *supra*. It urges that where there is a mixed inter-intrastate facility, the FCC should seek appropriate legislation and the issue must be resolved before implementing the TSP System.

11. NCS asserts that FCC jurisdiction extends to all intrastate facilities "affecting" interstate communications, based solely on its power to regulate interstate commerce. It states that jurisdiction must extend to wholly intrastate services to ensure that services vital to NSEP receive the appropriate priority treatment. As proposed, TSP will preempt any conflicting priority systems including any state or local priority systems, *i.e.*, systems of telecommunications priorities equal to or greater than the lowest NSEP TSP System priorities authorized.

12. In reply, CBT urges that the FCC and states work together to arrive at an agreed priority system. It asserts that local exchange carriers should not be required to administer separate interstate and intrastate plans, especially if they are in conflict with each other. MCI states that Section 1 of the Act does not confer jurisdiction on the FCC; it is a guide for how the agency should exercise the jurisdiction expressly granted by other provisions of the Act. It says that all commenters agree on the need to have a uniform set of NSEP instructions and it favors NARUC's suggestion to convene a joint board to review proposed rules. NCS, for its part, states that intrastate telecommunications service to which priority levels are assigned pursuant to TSP rules should remain under federal jurisdiction. It agrees with the majority view that FCC jurisdiction must be asserted. NCS disagrees with NARUC's position with regard to limited FCC jurisdiction and the need for a federal-state board. It notes that the states are among members of the TSP System Oversight Committee and suggests that if a board of state commissioners is established its review be submitted to that Committee. In any case, it opposes establishing a federal-state joint board for reviewing proposed TSP rules because the NCS Council of Representatives and NSTAC Task Force have already done so and have been subject to public review and comments. Finally, USTA supports only federal preemption necessary to implement TSP.

13. *Discussion*. The proposed scope of TSP rules, Section 4(a)(1)(b), states that domestic NSEP services include intrastate telecommunication services that are inseparable from interstate or foreign telecommunication services, and intrastate telecommunication services to which priority levels are assigned. As noted in the NPRM, we have jurisdiction over physically intrastate lines that carry interstate service. *NARUC v. FCC*, *supra* note 10. Moreover, it is well established that we may preempt state regulation when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 (1987) at n. 4. We also have a strong national security mandate from Congress, expressed in Section 1 of the Act. These principles permit us to preempt state priorities as needed, as we describe below. The intent of TSP is to establish a national security emergency preparedness priority system that is effective and responsive. It is NCS' position, and we agree, that the TSP System cannot be an effective mechanism for achieving national security emergency preparedness absent universal applicability. The Act requires that the FCC promote the safety of life and property and ensure effective communications for the purpose of the national defense. To the extent the goals of universality and national security - seminal features of responsive telecommunications used for the national defense - require preemption of state priority systems, we believe the Act is clear.

14. As a practical matter, we are not taking any preemptive action now. The preemption of a state telecommunications priority would occur only in those cases where there is a direct conflict between national and state priorities for the use of the same intrastate facility or service. If a state assigned a lower priority than did NCS to an intrastate service or facility and refused to recognize the higher national priority, the conflicting priorities for that inseverable service or facility would confuse and impede the administration of an orderly, responsive national TSP System. The resulting adverse direct and indirect impact on the effective implementation of TSP by such conflict could be significant. Unless preempted by the national TSP System, the existence of conflicting state priority systems would undermine the goal of TSP and the intent of Congress through Section 1 of the Act to promote the national defense. We therefore find that inclusion of intrastate services under Section 4(a)(1)(b) of the TSP rules represents a reasonable and necessary exercise of federal jurisdiction under Section 1 of the Act.

15. We note that local and state emergency services such as 911 can be accommodated within TSP, negating the need to include them under state systems. TSP, however, will continue to permit state systems to include these

services -- unless there is a conflict. As discussed above, in the event of a conflict it would not be feasible to separate the operation of the federal TSP system from that of the state system. The federal system must prevail,[11] and we would preempt. *NCUC I*, *NCUC II*, *cf. Louisiana PSC*, *supra* at n. 4.

16. *Switched, cellular, other services.* The rules offered for comment in the NRPM included switched services, though the TSP System's applicability to the public switched network (PSN) would be "limited to: (a) provisioning of such services . . . and (b) restoration of cellular services." In view of NCS' explanation that the defense community's current need for restoration priority of switched services only extends to a few cellular systems, we sought comment on the practical effects of this limitation, *viz.*, does the limitation have an effect upon the balance between the needs of NSEP interests with the needs of the general public in ensuring efficient service at reasonable cost? We also sought comment on the technical problems associated with restoration priorities for switched services, which might also apply to cellular systems. In addition, we asked what practical problems would follow eliminating the limitation entirely, and whether there is any basis for concern that extension of the TSP System to the PSN would result in carriers claiming priority treatment for all circuits because of the inability to identify which circuit might carry the NSEP service. NPRM at para. 22. Finally, we asked interested parties to comment on the appropriateness of including additional services, such as air-to-ground service, in TSP.

17. In AT&T's view, which is shared by Bellcore and most other commenting carriers, the proposed rules properly leave PSN restoration to the local exchange carriers because the routes calls take through the local exchange carrier's (LEC's) network cannot be identified by the interexchange carrier (IXC). AT&T would retain the parenthetical reference to cellular in Section 6(f)(2). For similar reasons, AT&T would limit applicability of restoration of cellular services to cell sites or dedicated trunking between cell sites and carriers' control centers. Again for reasons of inability to identify routing, AT&T and GTE ask that "virtual private line" be deleted from the definition of "Private NSEP telecommunication services," Section 3(k). AT&T explains that dedicated circuits are used to the LECs' central offices, like PSN lines, and then to the IXC point of presence (POP); beyond that point the call cannot be identified, it claims. Bell Atlantic also claims that restoration of the PSN is not practical because once the PSN is disrupted most of it will have to be restored before service can be provided to anyone. It proposes a new Section 6(f)(3) that would authorize telecommunications vendors to restore the PSN simultaneously with private line services which have been assigned restoration priorities. Bell Atlantic petition, pp. 10-11. Bell Atlantic would also limit cellular restoration to the facilities between mobile service switching offices and the first point of switching in the LEC office. Pacific Bell would leave restoration of the PSN to the Exchange Carriers Standards Association. Southwestern Bell adds that all control and orderwire facilities would have to be restored in order to effectively restore and operate any NSEP service which depended on the capacity and ubiquity of the PSN.

18. Bellcore proposes amending Section 4(a) to codify the limitations on TSP's applicability to the PSN. It also proposes to include services which use private fixed facilities in the definition of private NSEP under Section 3(k); and would specify switches, interoffice facilities and subscriber loops under the definition of public switched network facilities in Section 3(m). Finally, Bellcore and Pacific Bell would exclude custom calling features from priority provisioning. For its part, BellSouth opposes the language in the Note to Section 4(a)(1) that permits "unlimited expansion" of other types of public switched service to be authorized in the future. GTE adds that the ability to restore, provide priority service during stress conditions and keep track of individual B-1 (business) and R-1 (residential) lines is beyond the current needs of NCS and not cost-justified. GTE also asks that the reference to PSN in Section 13(c), Essential NSEP, be deleted because that section includes references to restoration.

19. CTIA states that inclusion of PSN and restoration of cellular in TSP will require certain technical arrangements between landline exchange carriers and cellular carriers. It asserts that the benefits of inclusion far exceed the costs of denying availability of cellular service to national defense and emergency personnel in time of crisis. It states that the cellular industry does not intend to force exchange carriers to restore an entire cellular system for the purpose of providing service to only a few NSEP users. McCaw and Telocator emphasize the technological developments forthcoming in cellular service that they say will eventually permit identification of trunks carrying NSEP services to facilitate LEC's response to cellular services qualifying for priority treatment. McCaw urges the FCC to include provisioning of all switched services and restoration priority treatment of cellular services at initial implementation. GTE seeks inclusion of air-to-ground service facilities to the LEC office to the extent needed to support NSEP communications needs. Southwestern Bell opposes inclusion of services such as air-to-ground until additional experience is gained under TSP. Teltec opposes including non-cellular PSN services in TSP, noting that radio common carriers (RCCs) should not be included because there is no apparent need for beeper services during an emergency that would justify diversion of scarce resources away from restoration and provisioning of vital NSEP services. It nevertheless concludes that restoration of entire cellular systems is necessary. US West suggests that the cellular industry and government develop standards for distinguishing NSEP cellular users from other cellular users so that priority trunks and data services can be restored in emergency situations. Pacific Bell notes that mobile telephone switching offices are connected to local offices and to access tandems for IXC access via dedicated or PSN facilities. It asserts that where cellular communications utilize the PSN, priority restoral is not feasible. It urges that cellular priority restoration for cellular carriers should be limited to those that do not utilize the PSN.

20. Nynex states that cellular service is secondary and is used by a limited number of subscribers. Granting cellular TSP status, it argues, would result in cellular services being restored prior to basic telephone service upon which the public relies heavily in cases of an emergency or disaster. If cellular is included, it urges, TSP restoral should be limited to cellular systems deemed vital to national security and sponsored or endorsed by a federal government defense entity. Teltec agrees to inclusion of cellular but suggests that other PSN services would be counterproductive. It would include entire cellular systems because cellular trunk groups are uniquely identified by

the LEC, but PSN shared trunk group carriers cannot identify NSEP traffic and this would lead to carriers claiming priority treatment for all circuits, Teltec asserts.

21. NCS states that NSEP TSP assignments are only a small percentage of all PSN circuits so that a resource conflict between restoration of PSN and private lines supporting NSEP services will be rare. If that does happen, it states, the NSEP requirements are of higher priority. NCS wants vendors to ensure that a sufficient number of public switched services remain available for public use prior to preempting any PSN service to restore an NSEP service. In response to Bellcore's suggestion for FCC sponsorship of a forum to prepare generic TSP guidelines, NCS would rely on the TSP Task Force and Task Force Subgroup formed under NSTAC to provide industry representatives a forum for advising the government regarding specific implementation issues. It notes that NCS and Bellcore are represented at TSP Task Force Subgroup meetings.

22. In its reply, AT&T states that it is not feasible to apply restoration priorities to the PSN. Bellcore replies that restoration should be limited to identifiable circuits; vendors cannot segregate NSEP traffic within the PSN and carriers should have flexibility to restore the PSN. BellSouth agrees that most of the network will have to be restored to restore any PSN. CTIA emphasizes the importance of cellular to provide service in a variety of emergencies, including floods, prison riots, earthquakes, etc. In response to Nynex, CTIA says that no preferential treatment is sought, that priorities will be assigned as with anyone else for provisioning or restoration. CBT, for its part, would permit 911-type restoration coincident with dedicated services. GTE points out that Military Airlift Command relies on civilian aircraft to augment its airlift capabilities in the event of a national emergency and therefore air-to-ground services should be included. McCaw states that those proposing limits to cellular restoration ignore existing PSN priority treatment capabilities being supplied or under development for NSEP service users, though it admits the various examples it cites are for provisioning. It also states that those proposing limits overlook delay caused (1-2 years) in implementation, *i.e.*, time required for Rule Making and/or procedural changes. It supports air-to-ground and mobile satellite service inclusion but opposes AT&T's suggestion to delete "virtual private line" from the definition of private NSEP telecommunication services in Section 3(k) because (1) it implies that such services are not included, (2) exclusion would obsolete emerging capabilities and (3) they are needed to provide full service packages to NSEP customers. Finally, referring to Southwestern Bell and Bellcore, McCaw states that those proposing limits view NSEP TSP as circuit based rather than service based, and argues that cellular service users can be identified by use of software in the mobile or portable terminal. Telocator also notes, in response to Nynex, that tariffs have been filed and accepted which permit priorities for switched service users and additional technological developments will unfold to permit priority treatment of PSN. MCI, citing Bell Atlantic, asks that the rules permit priority restoration of any service that can be identified as carrying the calls of a particular NSEP customer.

23. NCS opposes Bell Atlantic's assertion that the Commission should retain authority to overrule assignment of priorities for cases involving restoration of PSN and private lines. It says that this would split responsibility for priority level assignments between the FCC and EOP, and TSP in any case is sufficiently flexible, using the National Coordinating Center (NCC). NCS does not oppose Bell Atlantic's proposal to authorize carriers to restore PSN services, *e.g.*, 911, with private line services which have been assigned restoration priorities as long as local services can be provisioned or restored without delaying the priority provisioning or restoration of NSEP services. In response to Bellcore's claim that vendors have discretion to exercise judgment in allocating resources when dealing with major outages and conflicts, NCS says priority services must be restored first. Further, NCS does not propose application of restoration priorities to PSN.

24. *Discussion.* It is generally agreed that cellular radio should be included as a service which may be assigned priorities under TSP. What is not agreed upon, however, is how much of the cellular system should be included, *e.g.*, only cell sites or dedicated trunking between cell sites and carriers' control centers. Similarly, there is division with regard to other services such as air-to-ground, satellite, etc. The purpose of TSP is to assure that telecommunications services can be provisioned or restored according to their importance relative to other services in times of specified emergency conditions. We would unnecessarily limit the flexibility of TSP in the future were we at the outset to limit the kinds of services to which TSP might apply. Thus, cellular radio, air-to-ground and other services are potentially no less critical to emergency preparedness than interexchange private line service, which is included under RP. We do not agree with BellSouth or GTE that Section 4(a)(1) should be restricted. Further, because it may be possible for some carriers to restore virtual private lines on a priority basis by software techniques, we think it unnecessary to remove the reference in Section 3(k) to virtual private line, as AT&T suggests. TSP is intended to offer a system by which carriers are presumed not to be engaged in the provision of unreasonable preferences in violation of Title II of the Act if they prioritize services to users in accordance with TSP requirements and procedures. Carriers are not required to include services under TSP that they cannot provide. As a general rule, therefore, we will not limit the applicability of the TSP System to any specific service. The general PSN, however, as generally agreed upon by the commenting parties, is not technically amenable to restoration because subscribers' PSN services are not identifiable within the switching and transport system hierarchy. We are amending the Note to Section 4(a) accordingly.

25. We believe the most efficient means for assuring optimal flexibility and response to emergencies requiring restoration of telecommunications services is to rely, to the extent reasonably possible, upon users and carriers to determine jointly the feasibility and availability of services that can be restored under a TSP priority. Sponsoring agencies and users are generally responsible for balancing the costs of seeking, maintaining and invoking service priorities against the benefits that are anticipated. Their incentive to limit costs is coincident with the goal of TSP to avoid the inclusion of services or components of services which technology does not allow to be restored on a priority basis or are exceptionally costly. As noted, not all services are necessarily subject to TSP priority assignment or restoration. For example, the record indicates that the means for cellular subscriber identification are not available to permit end-to-end cellular restoration capability. It would not be appropriate for NCS to assign a priority to

network elements that carriers cannot restore, nor should users submit such requests to NCS. Accordingly, we are modifying the scope of TSP, Section 4(a), to reflect these findings.

26. Bell Atlantic has proposed a revised Section 6(f)(3) to authorize vendors to restore the PSN simultaneously with private line services which have been assigned restoration priorities. NCS has no objection provided NSEP priority services are not delayed. Our policy, as noted in the NPRM at para. 19, is to balance the needs of NSEP interests with the needs of the general public.[12] The last sentence of Section 7(b) [7(a)(1)] provides that after ensuring that a sufficient number of public switched services are available for public use, such services may be used to satisfy a requirement for provisioning NSEP services assigned priority level "E" or restoring NSEP services assigned a priority level from "1" through "5." This essentially follows the existing RP rules which state at 47 C.F.R. Part 64, Appendix A, para. 3(a), that carriers should insure "that a sufficient number of public switched network services will remain available for public use." This approach evoked no discernible problems during the implementation of RP and seems a reasonable approach for TSP that accommodates NCS as well as carriers and the public. This should also assuage Nynex's concern that inclusion of cellular service in TSP will result in that service being restored prior to basic telephone service.[13]

27. The suggestions of Bellcore with regard to the definition of private NSEP under Section 3(k) and inclusion of switches, interoffice facilities and subscriber loops under the definition of public switched network facilities in Section 3(m) appear to be useful clarifications. Exclusion of custom calling features, however, as suggested by Pacific Bell and Bellcore, seems an unnecessary restriction in view of our decision above to encourage flexibility in the services to which TSP applies. Similarly, Teltec's opposition to inclusion of RCCs in the TSP System would be restrictive and we prefer in the first instance to rely on the joint judgment of user and carrier, with NCS and FCC oversight, to determine which services should be included. Other editorial suggestions concerning, for example, the reference to public switched services in Section 13(c)[12][c] may similarly unnecessarily restrict the flexibility of the TSP System. By rules of construction, the specific definitions and explanations of intent set forth in this order should be sufficient to clarify the applicability of the rules.

28. *Delegation.* In the NPRM we noted that several parties have expressed concern over what they consider over-delegation of authority from the FCC to the EOP in the process of priority application and assignment. We stated at para. 26 of the NPRM that it is neither appropriate nor possible for the Commission to delegate to EOP, or others, the ultimate authority for determining whether preferences granted under the TSP System are unlawful. The language of the proposed TSP rules, we said, recognizes the authority of the FCC over EOP priority determinations and other responsibilities described in Section 6 of the proposed appendix. We also said that we do not view delegation of administrative responsibilities for TSP implementation as an inappropriate delegation of authority, particularly in light of the essentially ministerial nature of the initial priority assignment process, and given the RP precedent. We asked interested parties to focus upon proposed Sections 6(b)(2)(g) and 6(f)(9), which seemed to offer open-ended Rule Making authority to EOP. Because it is not clear what limits on the scope of such EOP-generated regulations and procedures are contemplated, and given NCS' likely use of additional procedural instructions, *e.g.*, Directive 3-1 which provides TSP instructions to the executive agencies, we asked NCS and interested parties to examine the intended meaning, potential impact, limitations and FCC oversight role with regard to these subsections. Finally, we asked interested parties to comment on the issuance of declaratory rulings to resolve questions regarding EOP procedures.

29. Arinc states that delegation should be restricted to interpretation of substantive rules adopted by the Commission and that the EOP should not promulgate substantive rules related to NSEP-TSP. Arinc cites *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) and *Kent v. Dulles*, 357 U.S. 116 (1958), to support its assertion that the FCC lacks authority to delegate substantive Rule Making powers to the EOP. Arinc also urges that EOP have in place appropriate procedures for adoption of interpretative and administrative rules. AT&T urges the Commission to maintain close oversight over EOP-generated guidelines or rules in TSP implementation. It notes that RP did not permit EOP to issue rules and that EOP was limited to issuing forms, application and review procedures, etc. AT&T asks that EOP be required to file its proposed rules with the Common Carrier Bureau for approval, and suggests that the Commission chair the proposed Oversight Committee, with NCS playing a major role in administering the TSP System. Ameritech favors use of declaratory rulings and urges that where ministerial functions would cause carriers to bear additional burdens solely at the discretion of the EOP there is improper delegation. For its part, AAR suggests that EOP and the Commission arrive at a mutual understanding as to the extent of EOP's Rule Making authority.

30. Bell Atlantic states that the Commission must review supplemental TSP regulations proposed by EOP. It concludes that Sections 6(a)(1), 6(b)(2)(g), 6(c)(4), 6(d)(11), and 6(f)(9) be amended to reflect that the FCC retains authority to approve, modify, or disapprove EOP regulations. Bellcore adds that all Rule Making should be done in accordance with the Administrative Procedure Act (APA) and final rules should not grant Rule Making authority to EOP. BellSouth, however, states that delegation to EOP for initial priority assignment is appropriate since the FCC has final authority for EOP priority assignment, including resolution of disputes. It too urges that EOP must comply with APA requirements, which it notes require full notice and comment Rule Making. For its part, GTE urges that the EOP and NCS work jointly with industry to develop administrative implementation rules and procedures for the TSP System, with FCC review. It states that areas of dispute can be handled through abbreviated proceedings like declaratory rulings. McCaw does not oppose delegating Rule Making authority to EOP provided cellular and other vendors are not obligated to comply with such procedures until the Commission reviews and takes some affirmative action approving them.

31. MCI states that the Commission bears full responsibility for implementing the Act and while it may delegate ministerial functions the rules must be amended to clarify that NCS' Rule Making authority extends only to regulations directly in aid of its administrative functions. It believes that the forthcoming operations manual issued by

NCS will be so substantial as to warrant approval by the FCC. It considers the declaratory ruling procedure as an inadequate substitute for a limitation on EOP for NCS Rule Making authority. US West favors delegation of administrative responsibility to EOP but not Rule Making authority. Southwestern Bell also expresses the view that the potential substantive impact of EOP regulations requires that the Commission allow review of EOP rules adopted under Section 6(b)(2)(g), and it notes that Section 6(a)(1) already provides for issuance of declaratory rulings for EOP procedures. It suggests that the proposed rules lack a mechanism for affected parties to bring specific issues to the Commission's attention. Telocator adds that the Commission may use Rule Making, declaratory ruling, public notice or letter to act upon supplemental procedures adopted by EOP. USTA also opposes what it calls open-ended and unsupervised Rule Making authority delegation to EOP, except as necessary at times of conflict or other emergency. UTC avers that "operation and use" language in the proposed rules is too broad and goes to substantive amendment of the TSP rules. It urges that Section 6 be eliminated because, to the extent it delegates Rule Making authority to EOP, it exceeds the FCC's authority.

32. NCS states that the rules adopted through EOP would be supplemental and consistent with the Commission's TSP rules. It argues that any party viewing EOP's rules as exceeding Commission authority could seek a declaratory ruling from the Commission. NCS concludes that the proposed delegated authority is neither open-ended nor without Commission oversight. It argues that, without delegation, lengthy FCC Rule Making processes will be required. It notes that specific rules such as data elements, steps for reconciliation, discrepancy resolution and the like have been intentionally excluded from its TSP proposal to minimize unnecessary oversight.

33. In its reply comments, MCI states that delegation of other than ministerial functions to NCS would be unlawful abdication of responsibility and that NCS cannot impose substantive burdens on carriers. MCI suggests that NCS' use of declaratory ruling procedure is improper. It states that the FCC's affirmative obligation to govern cannot properly be discharged through exercise of a veto power. GTE supports Pacific Bell in opposing substantive rules without FCC review under the APA. Pacific Bell suggests that NCS and industry jointly develop operational details and specifications for TSP and submit them to the FCC for review, with substantive TSP rules promulgated under the APA. It argues that the declaratory ruling procedure is not a substitute for Rule Making because it occurs after rules are adopted. For its part, Southwestern Bell says that if NCS does not intend to acquire open-ended Rule Making authority, the rules should make that intent explicit. NCS, in its reply, notes that the Commission's rules provide for informal requests (47 C.F.R. § 1.4) or petition for declaratory ruling (47 C.F.R. § 1.2) or Rule Making (47 C.F.R. § 1.401). It states that the proposed rules do not grant open-ended Rule Making authority to EOP. It also states that the FCC's grant of authority is limited to regulations and procedures supplemental to and consistent with TSP rules and operation and use of the NSEP TSP System.

34. *Discussion.* Under Section 202 of the Act, 47 U.S.C. § 202, it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. By Section 1 of the Act, 47 U.S.C. § 151, the Commission "shall execute and enforce the provisions of this Act." The issue before us now is whether the "issuance of regulations and procedures supplemental to and consistent [with the TSP rules]" as referenced in Sections 6(b)(2)(g) and 6(f)(9) [Sections 6(b)(2)(h) and 6(f)(11) under NCS' revised proposal] can properly be delegated to another agency.

35. NCS offers no more than a general statement that its supplemental procedures will be consistent with the Commission's rules. Because the regulations and guidelines are not before us, we do not know whether they will require the Commission to engage a notice and comment Rule Making proceeding prior to their taking effect. Nor is there sufficient detail to provide us with an understanding of how NCS would assure that its supplemental provisions will remain "consistent" with the Commission's rules. On the other hand, we know from our experience with the RP System,[14] as well as by NCS' assurances in this proceeding, that in order to implement a reasonably efficient and effective TSP System NCS must be afforded some procedural latitude. It is conceivable that a declaratory ruling procedure, or another less formal approach, would permit an initial, fully participatory examination of NCS' proposed guidelines -- fulfilling the Commission's responsibilities under the Act -- before the guidelines are effectuated. If the proposed guidelines are of the nature contemplated by AT&T, *viz.*, strictly filing procedures, and/or they do not warrant initiation of a Rule Making proceeding, a declaratory ruling procedure will serve as an expeditious means for implementing NCS' procedural guidelines. In any event, the Commission will decide the appropriate procedural vehicle for examining and resolving the issues contained in NCS' proposed procedures manual when the manual is filed.[15] The procedures manual and other NCS regulations or guidelines will not be effective until Commission review has occurred.

36. *Preemption.* In the NPRM we discussed the need to clarify the preemption requirements proposed in Section 6(f)(5), which authorizes preemption of existing switched or non-switched services to provide an NSEP service. Several parties sought further detail on how this would be accomplished, how disputes would be resolved and to what extent carriers that preempt commercial non-priority circuits would be immune from liability. It was also suggested that a more flexible point of contact rule should be considered, *i.e.*, 24 hours for small carriers may be burdensome. We asked interested parties to comment on these issues.

37. AT&T states that revenues are lost from services that are preempted by higher priority services. It asks that the rules provide that service vendors may preempt or interrupt the services of users having lower or no priority status and that vendors who in good faith comply with such a request shall have no liability to users of interrupted services, or others. AICC states that the Commission is the only entity that can effectively generally ensure that equivalent services receive the same assignment (and interruption in inverse order of priority level) under Section 7. Ameritech asks that Section 7 provide that "so long

as a carrier acts reasonably in preempting non-commercial users under the standards therein, it should be presumed to have complied with Part 64 guidelines." It feels that preemption is not a big problem in that there are generally spare facilities available, and TSP requests should not divert all resources to TSP restoration. Bell Atlantic offers a subsection to exempt vendors from liability due to reasonable actions taken in compliance with rules or at the direction of EOP or the FCC. It would also amend Sections 6(f)(5) [6(f)(6)] and 7 to expand the requirement that vendors must preempt and will not be liable for commercial damages. Bellcore, Centel, NTCA, Pacific Bell and Southwestern Bell also would change Section 7 to hold vendors harmless for preemptive actions taken under TSP. *See* Bellcore Comments at pp. 7-8.

38. MCI adds that immunity would remove possible obstacles to rapid and flexible carrier response to NSEP needs. For its part, BellSouth states that carriers will want to include provisions in their tariffs limiting their liability for damages resulting from good faith compliance with TSP rules, and proposes the following additional subsection to Section 7:

> (d) In any event, nothing contained within these rules shall be construed to prevent service vendors from including provisions limiting their liability in their appropriate tariffs and/or contracts as a result of good faith compliance with these rules.

39. GTE suggests that if the rules allow interruption of service without customer consent to satisfy NSEP requirements, the Commission should provide protection from liability. Pacific Bell urges that consent of preempted users is not needed. It suggests that the rules provide that a user's consent is not required in order to preempt that user's service, and that a user will be notified when its service is preempted, if possible. It adds that because all emergencies are not anticipatable vendors should be given latitude to make preemption choices following generic guidelines authorized by the FCC. US West would add the following additional language to Section 6(f)(5) [6(f)(6)]:

> Any carrier required to preempt any customer, pursuant to the provisions of Part 64 of these rules shall be held harmless from liability should said preemption cause any customer to sustain damages in connection with said service interruption.

Teltec states that if there is no explicit immunity provision in the rules, Sections 6(f)(5) [6(f)(6)], 7(a) and 7(b) should be deleted. USTA also believes an appropriate limitation of liability provision is essential where the priority rules cause interruptions because of action that is directed by government.

40. NCS states that the purpose of Section 7 is to allow preemption without consent from affected users for "E" or restoral of "1-5." Preemption of provisioning of "1-5", on the other hand it notes, requires affected user agreement. NCS believes it is inappropriate to specify under what circumstances carriers are to be directed by government to preempt non-government users, since the actual user may not always be readily identifiable. On the liability issue, NCS notes that under *Palermo v Bell Tel. Co. of Pennsylvania*, 415 F.2d 298 (3rd Cir. 1969), reasonable actions by a vendor pursuant to FCC rules should not be a basis for liability. Also, under *American Tel. & Tel. Co.*, 82 FCC 2d 370, 372 (1980), a carrier has a right to reasonably limit liability and this is a balance between rights of aggrieved customers and the public interest in provision of telephone service at the lowest possible costs. Moreover, regulatory bodies have struck this balance by allowing vendors to limit liability for ordinary negligence. Annual 1985 Access Tariff Filings, 2 FCC Rcd 1416, 1423; *see also Lebowitz Jewelers, Inc. v New England Tel. & Tel. Co.*, 508 N.E.2d 125 (Mass. App. 1987). NCS asserts that vendors' exposure is not so unique as to require an exemption or limitation of liability specific to TSP.

41. On the matter of 24 hour point of contact, Teltec states that it supports Section 6(f)(3)(B) provided the requirement is satisfied by the availability of a contact person -- not the actual presence of personnel. NCS urges that the matter of emergency services and reports of outages is so critical that the cost associated with maintaining a 24 hour contact is not burdensome. It suggests providing the home number of the contact person. USTA asks that a list be maintained at the NCC for LECs not represented at the NCC.

42. In their reply comments, most parties, including AT&T, Bellcore, BellSouth, CTIA and US West agree that the rules should contain specific language limiting service providers' liability for claims of damages because of good-faith action to comply with the rules. BellSouth, while generally agreeing with NCS and Southwestern Bell on their comments with regard to consent, emphasizes that preempted users' consent should not be required to exercise a priority level "1 to 5" for provisioning. It also states that it is not clear whether consent of the user whose service is to be preempted is required.

43. GTE, in its Reply at pp. 6-7, claims that NCS uses "preemption" inconsistently with regard to consent in Section 7 and suggests that the term be deleted and Sections 7(a) and (d) read as follows:

> (a) Consent of the user whose service would be interrupted is required to interrupt that user's existing service to provision any NSEP service assigned a provisioning priority level from "1" through "5."
>
> (d) Service vendors may, based on their best judgment, determine the sequence in which existing services may be interrupted to provision NSEP services assigned a provisioning priority of "1" through "5." Such interruption is subject to the consent of the user whose service will be interrupted.

McCaw notes that cellular operators may be vendors, resellers or interconnecting carriers and, under TSP, may have to preempt existing services to provide or restore service. It proposes adding a subsection to Section 7 that would provide that service vendors shall not be civilly or criminally liable to any person for reasonable actions taken in good faith compliance with Section 6(f)(6) or Section 7.

44. Southwestern Bell, in its reply, says that NCS misunderstands what preemption means. It cites *Summer v Mountain States Telephone and Telegraph Co.*, 21 Ariz. App 385, 519 P.2d 874 (1974), where the court held that discontinuing intercept service was intentional and a limitation of liability clause was inapplicable.[16] Southwestern

Bell claims that where a vendor intentionally terminates service under NSEP the traditional form of limitation of liability, which is no more than a limitation of damages, is inadequate and the vendor requires exemption from liability because the act of preemption is essentially compelled, though not controlled, by the federal government. NCS states that it has redrafted Section 7 which, it says, should resolve AT&T, Bell Atlantic, BellSouth and US West's concern regarding leaving discretion to the vendor for preemption of user service. NCS also asserts that interruption without consent is referred to as ruthless preemption but TSP rules without such preemption would create a meaningless NSEP priority system. NCS claims the existing limitations on liability are sufficient and objects to AT&T's proposal that would recover from the NSEP user potential litigation costs or lost revenues, all of which it sees as inappropriate in any case. Allowing unlimited charges would be an economic incentive to a service vendor to interrupt NSEP so that restoral charges could then be billed, NCS says.

45. *Discussion.* The parties' comments in response to our questions concerning preemption focus on the matter of liability for carriers engaged in interruption, or preemption, of lower priority or non-priority services under the guidance and authority of the rules. Many of the commenting parties, mostly carriers, seek specific exemption from civil and criminal responsibility for actions taken pursuant to the TSP rules. Southwestern Bell relies on *Summer v Mountain States Tel. and Tel. Co., supra*, but that case seems to suggest that inclusion of a liability limitation clause in the TSP rules is not necessarily assurance of exculpation, if malfeasance can be shown. The essential purpose of TSP is to provide standards that permit carriers responding to NSEP provisioning and restoration priority requests to act lawfully and avoid violation of the proscription of 47 U.S.C. § 202 that makes it unlawful for any common carrier to engage in any unreasonable preference in connection with the provision of communications services. The rules themselves, without a specific, additional provision, offer the liability protection that the carriers in this proceeding seek because any claimant asserting unreasonable discrimination or preference has a heavy burden to show that the carrier had violated Section 202 of the Act. Presumably, the carrier would answer that it had acted under the authority of the TSP rules, whereupon the burden of proof would shift to the claimant to show that the carrier had not complied with the TSP rules. Were there a liability exculpation clause in the rules, the claimant still would have to show that the carrier had not complied with the TSP rules. The RP rules and our Declaratory Ruling on the NSEP Procedures Manual did not include an explicit clause[17] and we do not believe one is needed in the TSP rules. The existing legal framework is adequate to protect carriers from actions lawfully taken pursuant to the TSP rules, notwithstanding the increased number of potentially affected users. We therefore agree with NCS that no change need be made to Section 7 in this regard.

46. We now turn to the language of Section 7 regarding the need for consent prior to preemption. NCS has offered revisions that seem to respond to several carriers' concerns regarding leaving discretion to the vendor for preemption of user services. The new language provides that:

> a. To provision NSEP services:
>
> (1) User consent is not required to preempt any user's existing service to provision an NSEP service assigned a provisioning priority "E."
>
> (2) Consent of the user whose service would be preempted is required to preempt that user's existing service to provision any NSEP service assigned a provisioning priority level from "1" to "5."
>
> b. To restore interrupted NSEP services: User consent is not required to preempt any user's existing service to restore any NSEP service assigned a restoration priority level from "1" to "5."
>
> c. Sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority level "E" or restore NSEP services assigned a restoration priority level from "1" through "5":
>
> (1) Non-NSEP services: If suitable spare services are not available, then, based on the considerations in this appendix and the service vendor's best judgment, non-NSEP services will be preempted. After ensuring a sufficient number of public switched services will remain available for public use, based on the service vendor's best judgment, such services may be used to satisfy a requirement for provisioning NSEP services.
>
> (2) NSEP Services: If no suitable spare or non-NSEP services are available, then existing NSEP services may be preempted to provision or restore NSEP services with higher priority level assignments. When this is necessary, NSEP services will be selected for preemption in the inverse order of priority level assignment.
>
> (3) Service vendors who are preempting services will ensure their best effort to notify the service user of the preempted service and state the reason for and estimated duration of the preemption.
>
> d. Service vendors may, based on their best judgment, determine the sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority of "1" through "5." Such preemption is subject to the consent of the user whose service will be preempted.

While this responsive proposal satisfies the complaints of several commenting parties, it perpetuates a problem that we believe must be solved if TSP is to function effectively, *viz.*, the need for any prior consent.

47. The rules proposed in this proceeding are intended to permit the provisioning and restoration of NSEP services during periods of national "emergency" conditions (as defined in the proposed rules). The stated purpose of TSP, *see* Section 1(c), is to assure that "the priorities established can be implemented at once when the need arises." The imperative for successful implementation is the expeditious exercise of service interruption or preemption. Absent the resolute authority for carriers to act to achieve this end, rapid deployment of resources for provisioning needed services or restoring damaged services would be frustrated. The purpose of assigning priority levels to a qualified NSEP service is to reflect the relative

importance of that service under active national security emergency preparedness conditions. Thus, consent of an affected service user, *i.e.*, one having no priority or a lower priority, before interruption or preemption of that user's service is inconsistent with the achievement of the stated purpose of NSEP TSP. This is no less true when a vendor must choose among similarly classified users, *i.e.*, users having identical levels of priority. The vendor, under TSP, is given the authority to make a choice based on equitable and practical technical factors. Further, the vendor remains subject at all times to the prohibition of the Act if it acts unreasonably, *e.g.*, by failing to act according to the TSP rules and engaging in an unreasonable preference. Burdening the vendor with the responsibility to track user consent prior to preemption or interruption is untenable.

48. Further, removal of the consent requirement eliminates a concern some carriers have expressed regarding their potential liability for preemption of commercial or other NSEP users' services. They feel that failure to secure consent as required by the proposed TSP rules would subject them to legal liability. Without such a rule requirement, however, failure to obtain consent before preempting a user's service would not constitute a factual predicate for violation of the procedural requirements of TSP. It is probable that during NSEP actions consent disputes and authorization inconsistencies would not be resolved quickly, causing delays in service provisioning or restoration. In general, an environment in which vendors would be required to obtain consent from competing users of a valued service could introduce an unnecessary complication in TSP implementation that would disserve the public interest. In short, we view the right of consent by a user prior to preemption of service under TSP as a barrier to the effective implementation of TSP. Accordingly, we will modify Section 7 to remove the need for user consent.[18]

49. As to the 24-hour point of contact matter, we believe that the intent of Section 6(f)(3)(b) is to assure that a carrier representative is available at all times to initiate response to NSEP TSP needs. NCS' proposed revision would require a 24-hour point of contact for receiving provisioning requests for Emergency NSEP services and reports of NSEP service outages or unusability. No party opposed NCS' revision and we are of the view that it satisfies the original intent of the provision. If the point of contact requires the availability of the home telephone number of a carrier's employee, we leave that choice to the carrier. USTA's suggestion that a current list of LECs' contact persons be maintained at the NCC, while an efficient way to achieve a centrally filed summary of contact persons, is probably better organized independent of this proceeding by NCS. We will therefore not modify the rule to require such a list.

50. *Costs.* In the NPRM we discussed the issue of carrier recovery of TSP expenses. The proposal itself, at Section 6(d)(5), provided that service users would "[p]ay vendors any authorized costs associated with services that are assigned priority levels." Also, Section 6(f)(7) authorized service vendors to receive compensation for costs authorized through filed tariffs or negotiated contracts. Several parties urged, among other things, that the Commission develop a mechanism with specific provisions for common carriers to recoup initial expenses and subsequent implementation costs. We noted that NCS' proposal specified two means of compensation for costs: tariffs or contracts. Some carriers, we said, may not be required to file tariffs; however, dominant carriers offering interstate services are under a statutory responsibility to file and maintain tariffs for their telecommunications offerings. We noted that there was some potential that the language of subsection (b) of Section 6(f)(7) could be incorrectly interpreted to suggest that there is an exception to the Title II requirement that carriers offering interstate services reflect the rates, terms and conditions of those services in tariffs. In order to clarify that issue, we proposed alternative language for subsection 6(f)(7), though we did not alter the language of NCS' proposal in the appendix to the NPRM.[19]

51. We observed that it is not clear that the intent of NCS' proposed carrier cost recovery rule, *i.e.*, to rely on tariffs or contracts, is inconsistent with methods currently used by carriers, under RP or otherwise. We noted that Title II of the Act and the Commission's rules contain the procedures for filing, examining and challenging tariffs filed with the Commission. We also noted that all related support data are in the public domain, subject to petition or opposition. We asked interested parties to explain why implementation of NCS' proposal cannot be accomplished through existing regulatory cost recovery mechanisms, and why existing accounting rules and Commission policies do not provide adequate guidance to identify and allocate costs. We emphasized that the Commission's fundamental policy is that costs be assigned to the cost-causative user, not the general ratepayer. We asked that parties who do not find these policies, practices and procedures adequate to suggest and justify new procedures or methods to accomplish effective cost review and cost-causative recovery. We also asked that such suggestions be fully explained and justified under Title II of the Act and the Commission's rules and policies.

52. In their comments, Arinc, McCaw and USTA agree that using existing regulatory cost recovery mechanisms and charging cost-causative users by tariff is appropriate. McCaw, however, suggests amending Section 6(f)(7) [6(f)(8)(b)] to read that "tariffs are not required" rather than "the carrier is not required to file tariffs" in order to recognize that service vendors which are not carriers are also entitled to compensation for costs through properly negotiated contracts and avoid possible misinterpretation of the Commission's proposed revision. AICC and NCS state that they favor the Commission's proposed revision, though NCS adds that the language should read, "Provisions contained in properly filed state or federal tariffs." Ameritech generally favors recovery through tariffs, including the up-front developmental expenditures. It urges that tariffs for TSP cost recovery also include provisions for expenses for restoring preempted services.

53. BellSouth and NARUC agree that cost-causers, *i.e.*, service users, should be responsible for actual installation and restoration costs. NTCA, Pacific Bell and Southwestern Bell concur that general ratepayers should not pay. NTCA suggests that the National Exchange Carrier Association (NECA) develop a standard TSP tariff for all carriers in order to reduce the burden on small carriers. USTA urges the Commission to consider a particular carrier's, NECA's and other tariff proposals designed to effectuate the TSP System. USTA also urges that TSP developmental and implementation costs be expensed because all parties are benefited. BellSouth asks that initial

and ongoing costs of TSP be recoverable by the service providers. It recommends that a new subsection (c) be added to Section 6(f)(7) [6(f)(8)] to read:

> Costs shall include, but not be limited to, initial costs incurred in the installation and implementation of the NSEP system, direct costs incurred as a result of the expedited installation and emergency restoration of NSEP approved circuits to the end-user and on-going costs incurred in maintaining the NSEP system.

Nynex suggests that recovering costs from TSP users would be "exceedingly difficult to administer." It states that it is not possible to determine how the costs will be allocated without knowing in advance the ultimate number of TSP users, and no estimates are available. It further states that the costs for each TSP user would vary based on the number of circuits involved. For example, it says, the Nynex region might have 2,000 TSP circuits while other regions may have more. It claims that the implementation costs for its region are approximately2.2 million and the cost per circuit in the Nynex region would be about2,200 each, but could be less in other regions. It concludes that costs could be difficult to justify to customers and would be a hindrance to full priority implementation.

54. UTC, for its part, opposes costs being shifted from carriers to individual users seeking restoration priority because the NSEP TSP System is intended to protect the general public through the restoration of emergency and essential telecommunications services.

55. Centel states that specific tariff rate elements may be required, but existing cost allocation procedures and methods are adequate. It notes, however, that implementation costs will not be covered by these tariff elements. GTE generally favors the Commission's proposed rewording of Section 6(f)(7) [6(f)(8)] but suggests that details of implementation are needed to determine costs. Southwestern Bell argues that inclusion of intrastate services and facilities in the scope of TSP creates a problem with respect to compensation because the FCC's jurisdiction does not extend to pricing such services. It states that developmental and startup costs, the distinction between routine and special charges for activities such as service reconciliation studies, and whether costs will be recovered directly from NCS or from service users through new TSP tariffs all require FCC guidance. Section 6(d)(5), it urges, does not identify either the party responsible or the method of payment for special administrative costs incurred in responding to record reconciliation requests. It questions whether the charge to all service users for maintaining restoration priority status should include a share of the special administrative costs or whether separate charges should be established to recover such costs only from service users that cause the special activity.

56. MCI also agrees that existing regulatory mechanisms are sufficient for recovery of costs of development and administration of the TSP System, but states that tariff charges are difficult to develop with required notifications of circuit completion and database audits. US West states that carriers should be compensated for all costs associated with priority assignments implemented by request of EOP or any duly authorized agency, whether or not such assignments ultimately are approved by the FCC. Pacific Bell is concerned that the proposed rule does not address startup costs. System development, reprogramming, developing standard procedures, training, and identifying and marking certain circuits are part of such costs, it says. Moreover, it continues, some systems are unique to Pacific Bell. It urges that all costs to implement changes necessary to support the TSP System be identified and collected and paid for by NCS over a negotiated time period such as 24 months. As an alternative, it would assess monthly implementation charges for each circuit in TSP until costs have been recovered, though it notes that this would be difficult. AT&T suggests that costs of administration to enter orders, establish restoration procedures, establish and maintain data bases and file reports should be recovered through charges to users receiving priority assignments, on a one-time, non-recurring and/or monthly basis. It notes that AT&T Tariffs FCC Nos. 9 and 11 impose charges for changes in RP assignments. AT&T also suggests that less predictable costs, such as auditing, reconciling data, testing and evaluating TSP, and preparing special reports for NCS, should be rolled into charges to priority service users who benefit from NCS oversight.

57. In its reply, BellSouth states that "most" parties agree with it that initial costs and ongoing maintenance costs are equally significant to vendors and should be recoverable by them from the cost-causative users rather than general ratepayers. However, Cincinnati Bell states that it is not clear how costs of implementing and maintaining TSP would be recovered, *i.e.*, from the TSP user, NCS or ratepayers. McCaw supports NCS' suggested amendment to Section 6(f)(7) [6(f)(8)], and favors existing regulatory and contractual cost recovery mechanisms, with only general guidance from the FCC on cost recovery. MCI urges that start-up costs be recoverable on a non-recurring basis under existing tariff rules, whereas monthly charges are more appropriate for on-going costs, such as restoration and administration. MCI states that permitting carriers to assess charges against NCS as the direct causer of the costs (citing Pacific Bell) would ensure accountability for obligations imposed on vendors and would solve Nynex's concern regarding inability to apportion estimated start-up costs.

58. NCS responds to Pacific Bell's suggestion, asserting that the NSEP user and not EOP is always the cost-causer. If NCS were to pay the costs, NCS suggests, users would not be paying their full share of NSEP services, leading to more NSEP services than would likely be requested. NCS agrees with current FCC policy that assigns costs to the end-user as the cost-causer. NCS states that it is continuing to work with the NSTAC TSP Task Force to determine the frequency of reconciliation and volume of reconciliation information involved with vendor-to-vendor reconciliation activities which are necessary.

59. Southwestern Bell urges that especially for emergency NSEP services [which specify recovery without regard to cost], cost recovery mechanisms must be established in TSP early on, in sufficient detail to assure that vendors' cost recovery will occur. GTE suggests that the FCC consider requiring that NCS contract with each service provider to cover the initial developmental costs and then have the day-to-day operating costs borne by the users when they request NSEP priorities. This, it claims, would more fairly allocate the quantity-independent development costs to the true cost-causer and not result in geographically varying costs. It urges that audit and reconciliation costs be charged directly to NCS whenever it

requests such services. In any case, GTE says, costs cannot be determined until NCS provides firm details of its requirements and quantities involved, *e.g.*, data elements, steps required during reconciliation, how discrepancies are to be resolved, media and format for information, how service vendors are to provide information to EOP, how revised or revoked priority levels should be handled, how users provide information to EOP and how users provide EOP-designated service identification and assigned priority levels to service vendors. GTE notes that NCS has used the term "EOP designated service identification" (a 12-digit code) that it asserts may be either a new requirement or simply unapproved terminology for a previously identified requirement. GTE advocates settling the details first, before costing or implementation can be determined. Telocator concludes in its reply that additional tariff requirements for NSEP services are unnecessary. Finally, USTA states that all costs, both recurring and non-recurring, should be expensed in the year the cost is incurred, under Part 32. Tariffs are the correct vehicle, it concludes, but the FCC should verify that the government budgetary process will be able to accommodate the tariffs covering the non-recurring developmental costs; the FCC should also require that agencies provide accurate forecasts of volumes of circuits required -- before tariffs can be developed.

60. *Discussion*. The essential question posed in the NPRM was who should pay TSP costs: the general ratepayer, users such as federal agencies, taxpayers or NCS. The Commission's policy, as noted in the NPRM, is that the cost-causative user should be responsible for charges incurred by its request for a TSP priority or its use of TSP-related services. UTC's argument, which is basically that the general ratepayer is the ultimate beneficiary of TSP - and should therefore pay for it - is not without merit. Indeed, the purpose of TSP is to provision or restore facilities that are essential to the national security, and the general ratepayer is the most broadly identifiable user of the national telecommunications network. But the cost-causative user of NSEP telecommunications services is not the ubiquitous subscriber to the public switched service or the beneficiary of the TSP service[20] -- it is, as the term "causative" suggests, the entity that requests and invokes TSP priorities, *viz.*, the service user as defined in Section 3(s) [3(t)] of the TSP rules.[21] Ultimately, of course, taxpayers pay for the TSP System because the TSP service user is generally a government body, but taxpayers do not directly request priority classifications or invoke NSEP TSP activities -- the service user does. In short, by assigning the costs of providing TSP System priorities and services to "users", the Commission's policy of requiring the cost-causative subscriber to pay for the services provided is furthered. Moreover, no commenting party has offered a convincing showing that this policy should not be applied with regard to TSP. For these reasons we also reject the notion that NCS itself should be responsible for funding any of the carriers' start-up or administrative costs.

61. Most parties agree that the proposed tariff and contract mechanisms are suitable means for carrier compensation of TSP-related costs. Several parties commented on the proposed language of Section [6(f)8] and the revision offered by the Commission in the NPRM, cited *supra*. McCaw's suggestion that the language "tariffs are not required" rather than "the carrier is not required to file tariffs" in subsection (b) of the proposed revision, in order to recognize that service vendors which are not carriers are also entitled to compensation for costs through properly negotiated contracts, seems unnecessary. The plain meaning of the section is to require either a tariff or a contract. A carrier that is not required to file tariffs is embraced by the scope of the existing language, and that subsection does not apply to non-carriers. In fact, until invocation by the President of Section 706 of the Act, the TSP System rules are limited by their own terms to common carrier services.[22] NCS would add "state or federal" to our proposed revision to subsection (a), so that it would read, "Provisions contained in properly filed state or federal tariffs . . . ." While it is not clear what other kind of tariff NCS contemplates, since state and federal tariffs are the only tariffs we believe would be considered in the context of TSP, we see no harm in the suggested language.

62. The bulk of comments on the cost issue concern what cost elements carriers may seek to recover, and when. Various carriers suggest that administrative, start-up, software development, reconciliation, audit, standards and procedures development, training, database maintenance, system testing, report preparation and other costs be specifically recoverable under TSP, either on a recurring or non-recurring basis. It has also been noted that a significant number of carriers will not be subject to Commission review prior to their provision of TSP service. This is because local carriers and interstate non-dominant carriers, both of which are subject to the TSP rules, are not required to file TSP tariffs with the Commission.

63. Under the RP System, we relied upon interstate carriers to file tariffs using historically acceptable practices and we have received no reports of abuse or complaint. When the RP System was developed, carriers were generally subject to the tariff filing requirements of our rules and AT&T was the primary interexchange carrier, with its subsidiary Bell Operating Companies and other carriers concurring in its tariffs. Now, in a more deregulated environment and with a TSP System that is vastly expanded, AT&T's tariff filing no longer represents the bulk of the industry or necessarily serves as the standard for other carriers. Instead, we look to three possible alternative means to check carriers' use of improper accounting or cost recovery methodologies or practices. First, dominant interstate carriers, as before, are required to file tariffs with the Commission, and non-dominant interstate carriers may file such tariffs. These tariffs must comply with the practices set forth in Part 61 of the Commission's rules and are subject to review and opposition by any interested party, including NCS or a service user. Further, the Commission's accounting standards, embodied in Part 31 of the rules, provide means to identify and prevent interstate carriers' subsidization of competitive services by monopoly services, *i.e.*, cross-subsidization, or misallocation of costs between intrastate and interstate accounts. Failure to comply with these restrictions may subject the carriers to substantial penalties, and/or rejection of the tariff. It would appear that preliminary installation and implementation costs, direct costs associated with database development and recurring administrative costs, could be reasonable components of tariff-based charges. Second, the states will continue to apply their regulatory oversight procedures to the rates, terms and conditions of intrastate TSP services, much as the Commission does with dominant interstate vendors. Third, carriers engaging in contractual TSP negotiations with service users will be competing with other carriers on the basis of price and service factors. By their

budgetary and administrative review requirements, TSP service users can be expected to exercise diligence in negotiating TSP service agreements with carriers, challenging questionable accounting provisions and disallowing excessive or inappropriate charges.

64. We believe that the boundaries established by these regulatory and market mechanisms provide sufficient guidance to carriers as they embark on developing their tariffs or engaging in contract negotiations for TSP services. It is incumbent upon service users to examine closely the accounting methodologies and cost figures used by carriers with which they contract. Finally, for interstate carriers, both dominant and non-dominant, our Title II complaint procedures are available where violation of law is alleged or apparent. We do not believe it is necessary in this proceeding, therefore, to establish new standards or accounting guidelines for carriers in the provision of TSP services. The existing regulatory and market mechanisms appear adequate to assure that TSP cost accounting methodologies are conducted in the public interest. We remain available, however, to address specific instances of anticompetitive conduct or excessive cost allocation by carriers under our Title II complaint procedures.

65. *Procedures*. In the NPRM we observed that NCS' proposal did not commit NCS to respond to TSP priority requests within any specified time. We expressed the belief that some guidance or limit would be appropriate. We asked interested parties to offer comment on an amendment to Sections 6(b)(2)(a) and (b) that would require NCS to act within 30 days upon receipt of requests for priority assignment. We also asked interested parties to comment on the procedures necessary, *e.g.*, under the APA, to respond to requests for review of priorities. NPRM at para. 32.

66. Most parties commenting on our 30 day NCS response proposal favored it, agreeing that review of priority assignment requests by NCS should have deadlines. Arinc added that applications for review of EOP assignments be automatically stayed pending appeal to the Commission.[23] McCaw would require NCS response to requests for "essential" priority assignments within 30 days but 5 days for "emergency" level requests. MCI recommends a 7 to 10 day response requirement. Southwestern Bell favors five days for "essential" and immediate action for "emergency" provisioning priority requests, stating that actions based on requested but not yet authorized priority levels will result in increased costs and increased risk of error. Telocator favors NCS response to requests for "essential" priorities within 30 days and 3-5 days for "emergency" requests. Centel and UTC favor the Commission's 30 day proposal. UTC also advocates the Commission acting within 30 days on assignment appeals. NCS, for its part, states that hearings are not authorized under the APA [5 U.S.C. § 554] for appeals of priority assignments. NCS Comments, pp. 29-30. Also, NCS objects to the 30 day requirement, stating that it will initiate processing requests within 24 hours for "emergency" priority action requests and respond to "essential" requests as soon as possible. It further states that it expects to process all priority requests in less than 30 days, but opposes the 30 day limit.

67. In its reply comments, McCaw urges that more than good intentions are needed and that reducing the period to 7-14 days is justified in view of NCS' assertion that less than 30 days is actually necessary. MCI suggests that deadlines should apply to actual issuance of the priority assignment, not initiation of NCS review. Telocator urges that NSEP service providers need certainty regarding when they will receive a response from NCS on priority assignment requests. NCS replies that its opposition to 30 days does not imply that it expects a long response time, *e.g.*, 30 days is irrelevant under the "E" classification. It again asserts that rigid time frames are unnecessary.

68. *Discussion*. Apart from NCS, no party has opposed our proposal to establish a time limit on EOP for responding to priority requests. We continue to believe that such a limit is a necessary adjunct to efficient and responsive TSP System implementation. Several parties urged a shorter response requirement than the 30 days we proposed; only NCS argues that a 30 day requirement is unwarranted. As McCaw notes, NCS states that it will process requests in less than 30 days, which would suggest that the 30 day requirement would not significantly burden NCS. We do not believe that a shorter period than 30 days is advisable because during the first year of implementation NCS may find it difficult to accommodate the initial onslaught of TSP priority requests. As experience grows we believe the 30 day period will become an increasingly distant time boundary.[24] For these reasons, we believe that 30 days represents a reasonable initial limit for NCS and we will adopt that in Sections 6(b)(2)(a) and (b).[25] Response to requests for emergency category priority assignments will be handled by NCS in an expedited fashion and do not require a specific time limit. Parties experiencing delays in securing interim priority assignments from NCS may direct inquiries or complaints to the Commission.[26]

69. The current procedure for appeals is contained in Section 12 [11] of the TSP rules. We believe that revision of that section will expedite the TSP appeal process as well as provide participants with more detailed notice of the procedure they must follow. Before submitting an appeal to the Commission, we believe it more appropriate that EOP be given an opportunity to review its initial decision since, as a practical matter, the FCC will not routinely revise initial EOP assignments. Only then does it seem necessary to involve formal Commission review. We will adjust Section [11] accordingly. Service users and sponsoring federal organizations may appeal any priority level assignment, denial, revision, revocation, approval or disapproval to EOP within 30 days of dispatch of notification by NCS of the assigned interim priority to the service user. Such appeals will be submitted using an appropriate form or format and a copy must be sent to the Commission. EOP will issue its decision within 90 days. Service users and sponsoring agencies, if still dissatisfied, may then file an appeal with the FCC.[27] The party filing the FCC appeal must include factual details supporting its claim of priority assignment error and will serve a copy on EOP and any other party directly involved in the matter.[28] Any interested party may file a response within 20 days, and a reply within 10 days thereafter. No public notice of such appeals will be issued. The Commission will notify the parties participating in the appeal of its decision. The rules will be amended to reflect these changes. *See* Section [11].

70. *Multiple service facilities and orderwires*. At para. 33 of the NPRM we indicated that AT&T supported proposed Section 4(b), which provides that control services and orderwires (internal network management circuits) have priority over all other telecommunications services and are exempt from priority interruption. AT&T also recommended that Section 6(f)(2), which permits broadband and multiple service facilities to be restored even if

they carry mostly non-NSEP traffic, be included within the Section 4(b) exemption. We agreed with NCS that AT&T's position would result in an automatic exemption and elevation to exempt-priority status any multiple-channel facility. We nevertheless welcomed interested parties to comment further on AT&T's position.

71. Teltec disagrees with AT&T's proposal because it would allow AT&T "to scatter NSEP services across many facilities, elevating all AT&T wideband facilities to high priority." It favors classifying control services and orderwires as exempt. Teltec also asks whether CCS #7 (central office switch) is covered by Section 4(b). For its part, GTE states that control services and orderwires may be obtained from other carriers so they should be exempt no matter who owns them. It proposes assigning a unique priority level code for these services, or allowing use of "priority 1". USTA favors such services automatically receiving exempt priority. NCS proposes to revise Section 4(b) to exempt these services from "preemption" instead of "interruption". In its reply, Bellcore supports GTE and would assign orderwires a special priority code to assure immediate restoration, though it also states that there is no need to include them in TSP since they can be identified and given proper restoration emphasis.

72. *Discussion*. It is generally agreed that control services and orderwires should be treated differently from telecommunications services generally offered to users.[29] The rationale is that facilities used for these purposes are the essential internal means by which the underlying network is managed and controlled. The commenting parties are divided only as to whether it would be more useful to assign these services a special or high TSP priority or, as NCS has proposed in Section 4(b), it would be best to exclude them from priority assignment entirely. We believe that Section 4(b), which excludes underlying carriers' control services and orderwires from TSP, represents the most practicable means of assuring that the integrity of the network remains intact. Assigning control services and orderwires priorities under TSP would invoke procedures that would unnecessarily burden both carriers and NCS and would potentially undermine TSP responsiveness. Moreover, it is not clear that carriers' internal operations are the proper subject of TSP since they are not services offered to users and are therefore not subject to all provisions of Title II. For these reasons, we will adopt NCS' proposal, including its change of "interruption" to "preemption" in Section 4(b).

73. The matter of broadband or multi-channel facilities or services receiving Section 4(b) treatment by virtue of a single embedded control or orderwire service presents a Hobson's choice. Denying Section 4(b) status to a multi-channel or broadband service that unavoidably carries an orderwire or control service would defeat the intent of the TSP System to exempt control and orderwire services. On the other hand, granting the entire facility or service exempt status by the presence of a single control or orderwire service could result in elevation of otherwise non-NSEP services to Section 4(b) status. The lesser evil, of course, is to choose the latter and expect that carriers will endeavor to separate their control and orderwire circuits from other bulk facilities - where they judge it technically and operationally advisable. Since underlying carriers cannot charge users a premium under TSP for exempt Section 4(b) services, the incentive for abuse would seem minimal.[30] Nevertheless, we remain ready to respond to any complaint concerning marketing of facilities or services that are accorded Section 4(b) treatment, other than to other carriers for control or orderwire purposes. Consistent with the foregoing, we will adopt Section 4(b), as amended.

74. *Resellers*. In the NPRM we noted that the proposed TSP rules are similar to the RP rules with regard to the treatment of resellers except that the TSP rules would not require concentration of priority resale services in a minimum number of underlying facilities. The purpose of this change, we stated, would be to avoid a possible adverse impact on the survivability of NSEP services, *i.e.*, by encouraging diversity. The TSP proposal requires that the highest priority level assigned to any service using an underlying facility would determine that facility's priority level assignment; a single NSEP circuit could cause all non-NSEP circuits on a facility to effectively have the same priority. As a result, we said, resellers who strategically distribute their NSEP with their non-NSEP circuits among a variety of facilities could gain a competitive advantage over the underlying facility vendors. The vendors would be required to restore *all* of the resellers' circuits before restoring some of their own customers' non-NSEP circuits. In response to a suggestion by AT&T that deleting the proposed reseller rule section would void the problem, NCS replied that this would probably cause continual disagreement between resale and underlying facility carriers and create a competitive disadvantage for resale carriers in supplying NSEP services.

75. One possible alternative, we offered, would be to have the distribution of services among underlying facilities subject to FCC review, and the desired distribution specified by the customer rather than the reseller or vendor. We said that it would be useful to know the extent to which priority reseller services could be restored on a circuit by circuit basis because this would avoid the problem of having to restore a group of circuits to accommodate a limited number of priority services. We asked interested parties, in addition to commenting on this or alternative approaches to the reseller issue, to provide data regarding the extent to which users served by resellers will seek TSP priority, *i.e.*, the percentage of TSP services likely to be handled by resellers.

76. AT&T claims that NCS' proposal forces it to give competing OCCs [other common carriers] and resellers priority restoration of all leased circuits if a single circuit qualified for priority treatment. According to AT&T, the underlying vendor might have to preempt its own bank of facilities to provide a pipe for a reseller, losing revenues for the unused circuits. It adds that the alternative, for customer specification of distribution of circuits among underlying facilities, would satisfy neither the vendor nor reseller. The vendor can best determine optimum routing for prompt provisioning and restoration and neither the customer nor the FCC can manage service vendor networks. FCC involvement, it says, would burden administering TSP and delay implementation of TSP priorities. It states that Sections 3(t) and 6(f)(4) treat resellers as service vendors and require cooperation. This, AT&T argues, is enough to assure fair and appropriate restoration of reseller circuits. The underlying carrier would restore priority circuits without restoring non-priority circuits, if feasible, and would not have to discriminate against its own customers, AT&T states. AT&T would delete Section 8 and rely instead on the generic requirement that all service vendors must cooperate with each other to restore priority circuits.

77. Ameritech states that under today's technology it is generally not possible for a carrier to designate a TSP classification for individual circuits assigned to a non-channelized facility provided to an end user, interexchange carrier, or reseller. Only entire "pipes" can be assigned TSP designations. To prevent abuse by resellers who would spread their circuits out through multiple "pipes", it suggests detection through ongoing Commission review of the ratio of TSP circuits assigned to the TSP "pipes". For its part, Centel states priority restoration treatment of an entire facility because a TSP circuit is on the facility should be by industry guidelines, and not by the customer. The FCC can then review the results, within a reasonable time limit. In any case, it says, the customer should not be allowed to determine distribution of circuits. If the customer is permitted to choose and non-TSP circuits are not permitted, the carrier should be compensated by the customer for vacant, unused capacity which the carrier otherwise would have been able to use.

78. GTE favors the end user specifying the distribution of its NSEP circuits, which would then be reviewed by the FCC. GTE's concern is that resellers and facilities-based carriers each receive a level playing field. GTE states that it cannot offer any number of TSP circuits likely to be carried by resellers, that this information is only obtainable from the government. McCaw suggests that the proposed rule regarding resale carriers be amended to read, "Resale and Interconnecting Carriers", and offers several language changes.[31] It opposes underlying facility carriers determining the distribution or interconnection of reseller-supplied NSEP telecommunication services. McCaw will work with carriers and/or users "to help separately identify NSEP services to them." McCaw Comments, pp. 12-13. MCI states that facility dispersion could require restoration of non-priority circuits and dilute the ability of carriers to respond to other NSEP needs. It suggests that the simplest way to maximize a carrier's ability to respond to NSEP needs is to require resellers to concentrate NSEP service in a minimum number of facilities. It adds that if survivability of a circuit is required, the end user or reseller can order route diversity services.

79. Southwestern prefers that the rules restrain abuse of NSEP by intermediary service vendors. Otherwise, it argues, they can strategically distribute NSEP circuits among all circuits purchased so that they will have rendered all their services/facilities NSEP, and market to their advantage. It urges the FCC to pursue data collection concerning percentage of TSP services likely to be handled by resellers. Pacific Bell states that the problem of resellers' distributing their services among many facilities is common to all carriers and is no more than a marketing tool. Pacific Bell believes non-disclosure of NSEP services is in the national interest because this will prevent marketing abuse. Teltec disagrees with AT&T's original proposal to delete the reseller provision. It doesn't want FCC review of resellers' distribution of services among underlying facilities because these are basic business decisions and it would involve millions of circuits.

80. USTA urges that "resale circuits generally should be excluded from TSP system inclusion because of administrative and cost problems." USTA Comments, p. 5. It states that a circuit resold to the government or other priority customer might not be known to the underlying facilities-based carrier and restoration of that circuit would be impossible without either specific advance circuit identification or unnecessary restoration of other circuits in a trunk. NCS states that NSEP services provided by resale carriers must be recognized by the provider of the underlying services and treated according to Section 6(f) of the TSP proposal. It would incorporate the intent of Section 8 into Section 6(f), and delete Section 8. This, it suggests, would clarify the equal application of the proposed rules to all service vendors.

81. In its reply, AT&T withdraws its earlier support for Section 8 and substitutes NCS' revised Section [6(f)(5)], which provides:

> All service vendors, specifically including resale carriers, are required to ensure that service vendors supplying underlying facilities are provided information necessary to implement priority treatment of facilities that support NSEP services.

AT&T views resellers as service vendors and states that rules should not grant preferred restoration rights to resellers over underlying carriers. GTE also agrees with NCS that there should be equal application of the proposed rules to all service vendors. It also supports Pacific Bell's suggestion that a non-disclosure rule could help avoid marketing abuse.

82. McCaw does not agree that reliance on "service vendor cooperation" is adequate as a replacement for Section 8. It urges that specifying the rights of resale and interconnecting carriers would not provide resale or interconnecting carriers with a competitive advantage, but would prevent them from being subjected to a competitive disadvantage. It argues that if Section 8 is deleted the Commission should clarify that Section 6(f)(4) requiring cooperation also requires all service vendors to provide equal and non-discriminatory treatment to a vendor's affiliated entities and resale and interconnecting carriers. Also, McCaw calls attention to NCS' proposed Section [6(f)(5)] that includes "specifically including resale carriers" but does not include such language in Section 6(f)(4) regarding the obligation to cooperate.

83. In its reply, NCS states that the decision to restore on a priority basis the entire facility or the single service should reside with the service vendor providing service to the reseller. NCS prefers a more flexible approach than MCI's request that resellers be required to concentrate NSEP services in a minimum number of facilities. It suggests that the determination as to which NSEP services are assigned to which facilities be left to vendors, using contracts. In response to Southwestern Bell's suggestion that facility-based carriers use the Commission to resolve cases of TSP abuse, NCS notes that Sections 6(b)(2)(i) [6(b)(2)(j)] and 6(f)(2)(e) already provide for the Oversight Committee and EOP to resolve conflicts. Nothing else is needed, NCS argues. NCS also concurs, for national security reasons, with the suggestion that information regarding facilities that contain NSEP services should not be disclosed to those not having a need-to-know. NCS would add a new Section 6(f)(11) that would require service vendors to "not disclose information concerning NSEP services they provide to those not having a need-to-know, and not disclose this information in order to offer preferred restoration to potential or actual customers."

84. *Discussion.* In the RP System we adopted a rule that required concentration of resellers' priority facilities onto the minimum number of underlying facilities. The ratio-

nale for this approach was to avoid the consequential elevation of underlying facilities to priority status, an appropriate objective given the ability of most carriers at that time to identify and/or segregate facilities assigned RP priorities. Now, however, services are not necessarily associated with specific facilities. Today's networks use a variety of transmission techniques to interlace disparate services onto one facility, *e.g.*, through digital encoding and time division multiplexing. The proposed TSP rules respond to these evolutionary changes by, *inter alia*, focusing on services rather than facilities.[32]

85. Section 8 of the proposed rules provides that any facility carrying a reseller's priority service will itself carry that level of priority. The difficulty of this approach, as noted in the NRPM and by several commenters, is that the dispersion of a reseller's priority services could result, by the nature of trunking, in a multiplicity of the reseller's non-NSEP facilities being restored before the underlying carrier's non-NSEP services, and resulting in loss of revenues to the underlying carrier for facilities it must take out of service to satisfy the reseller's priority needs. Based on the comments, there is inadequate support to invoke our proposal to subject the distribution of services among underlying facilities to FCC review, with the desired distribution specified by the customer rather than the reseller or vendor. We agree with AT&T that FCC involvement in this process would potentially delay TSP implementation or, as Teltec suggests, require review of an enormous quantity of circuits. Commenters generally do not favor customer specification of service distribution, which purportedly would lead to more administrative problems that it would solve. GTE's view, that customers specify the distribution of NSEP circuits, would require FCC review, which we do not believe is justified. MCI's position, to require concentration of NSEP services in a minimum number of facilities and require the end user or reseller to order route diversity for increased survivability, seems unnecessarily inflexible.

86. In the NPRM we asked interested parties, in addition to commenting on alternative approaches to the reseller issue, to provide data regarding the extent to which users served by resellers will seek TSP priority, *i.e.*, the percentage of TSP services likely to be handled by resellers. No party offered any hard data to aid in resolution of this issue. Nevertheless, in the absence of such data, we would not exclude resale circuits generally from the TSP System, as USTA urges in its comments. A substantial component of the communications service industry is represented by entities that at least in part resell other vendors' facilities or services. Restricting TSP priority assignments to underlying facility-based carriers would offer no administrative advantage and could remove an important class of vendor of emergency or essential telecommunications services from the TSP System.

87. Several parties, including NCS, agree that Section 8 is not needed if additional language is included in Section 6(f) to specify resale carriers. It would appear that the consensus of those commenting on the reseller issue is that Section 8 should be deleted but that additional language elsewhere in the rules provide that carriers generally cooperate in good faith on matters of priority treatment. Apart from the consensus, it seems that the intent of proposed Section 8 is embodied by provisions contained in other sections of the rules. There are three essential elements to Section 8: recognition of resellers, assignment of the reseller's service priority to the underlying vendor's service and reseller's burden to notify underlying service vendor of priority information. By adding new Section [6(f)(5)], which specifically refers to resale carriers, there is adequate recognition of resellers as well as sufficient assurance that underlying carriers are supplied with the information needed to implement priority treatment of facilities that support NSEP services. Also, the general requirements in the rules for recognition of properly assigned priorities removes the need for a special reference to resellers for that recognition – or for equal and non-discriminatory treatment of a vendor's affiliated entities and resale and interconnecting carriers. Accordingly, we will delete Section 8, as proposed.

88. Finally, it has been suggested that resellers' distribution of services among many facilities is no more than a marketing tool. The thought seems to be that a reseller can offer priority restoration to users that do not independently qualify for priority treatment because they know that certain non-NSEP services are embedded in the TSP-priority facilities. It has also been suggested that, to the extent distribution is a marketing tool, non-disclosure of NSEP services is a means to prevent abuse. We believe that Title II of the Communications Act already contains adequate safeguards against this kind of conduct. A primary purpose of TSP, as noted earlier herein, is to provide carriers with protection against allegations of unreasonable preferences arising out of priority provisioning or restoration. 47 U.S.C. § 202. Were a carrier to market non-NSEP services based even in part upon representations that those services would be provisioned or restored on a priority basis (because they would be embedded in TSP-priority facilities), it might have engaged in actionable conduct, *i.e.*, in violation of the Communications Act. We believe that this disincentive is sufficient to assure that resellers will not abuse ancillary priority benefits they derive from their TSP involvement.[33] NCS' support for a rule section that would codify this expectation is founded on a general security rationale, *viz.*, that NSEP-related information should not be disclosed to parties not having a "need-to-know". The utility of NCS' proposed Section 6(f)(11) to prevent abuse by resellers is questionable because there is no standard established for the meaning of "need-to-know." Nevertheless, its inclusion would not be inconsistent with the Title II restrictions we have discussed, and it would alert carriers to the need to exercise caution with regard to information about NSEP services, for both security and marketing-abuse reasons. On balance, we favor this change and will adopt it as Section [6(f)(13)] of the final rules, with minor revision.

89. *Recordkeeping and reconciliation.* In the NPRM interested parties were asked to comment on the extent to which TSP, in conjunction with NCS' recordkeeping and reconciliation efforts, will alleviate the problem of inconsistent or faulty records. It was recalled that one of the problems of the RP System was recordkeeping deficiencies among the various participating entities, including NCS and the carriers. NCS originally proposed: Section 6(b)(2)(e), which would require the EOP to periodically initiate the identification and reconciliation of any discrepancies between EOP records relating to priority level assignments and the records of service users/contracting activities and vendors; Section 6(c)(3), which would require sponsoring federal agencies to cooperate with EOP (a) during NSEP telecommunication service audits and revalidations, and (b) to identify and reconcile any discrepancies among service user/contracting activity, vendor

and EOP records relating to priority level assignments; Section 6(d)(10), which would require service users to cooperate with EOP (a) during NSEP telecommunication service audits and revalidations, and (b) to identify and reconcile any discrepancies among service user/contracting activity, vendor and EOP records relating to priority level assignments; and Section 6(f)(6)(e), which would require vendors to cooperate with the federal government to identify and reconcile any discrepancies between user/contracting activity, EOP, and vendor records.

90. In order to avoid the possibility that recordkeeping processes "may be used improperly as a means to change circuit designations free of charge . . .," Ameritech suggests, without explaining its assertion, that any guidelines distinguish between audits and revalidation or quality assurance activities. It urges that discrepancies be resolved through the normal service order process, subject to tariff charges, with appeals handled by the customer relations process. BellSouth expresses concern regarding periodic audits which may be conducted by the Commission. It fears an overly burdensome level of detail and recommends that audits as defined in Section 3 be limited to review of billing discrepancies and/or reconciliation of NSEP user and vendor data base information. It urges no more than annual reviews. US West suggests the definition of audit be revised to read: "Audit means a review, conducted by the parties, in response to an identified problem."

91. Pacific Bell suggests that, rather than responding to audits, vendors should respond to inquiries because audits are expensive and time-consuming. It would delete Section 3(b), Definition of Audit, and replace it with "verification", *i.e.*, review in response to problems identified through revalidation and reconciliation. It proposes a new Section 6(f)(10) that would require vendors "to provide to EOP, upon reasonable request, information sufficient to verify discrepancies." Also, to assist the verification process, Pacific Bell would add language in Section 5 that would include a reference to the NCS' Management Information System (MIS) database as a source of priority level information. It also proposes that EOP be responsible for deciding whether there are discrepancies between EOP records and users and vendors and suggests that revalidation be limited to once a year, and not less than once every three years. Finally, Pacific Bell questions the identity of "authorized" entity in proposed Sections 6(f)(3)(c) and 6(f)(6)(a) [6(f)(7)(a)].

92. Southwestern Bell identifies two types of audits, billing inquiries and reconciliation. The first of these, it notes, are normal daily business activities; the second, it states, involves comparison of NSEP information between one or more vendors and government for the purpose of resolving discrepancies. Reconciliation, it urges, should be allowed no more than once a year between EOP and each vendor, and should be accomplished by use of computer tapes. It argues that the charges should be borne by the cost-causer and determined by underlying service costs. Southwestern Bell would revise the definition of audit in Section 3 to read, "Audit means a quality assurance review in response to billing discrepancies and/or reconciliation of NSEP TSP service information/database." It would also add the following new definition in Section 3: "Reconciliation means the comparison of NSEP information and the resolution of identified discrepancies."

93. For its part, NCS states that it developed the reconciliation process to cure the current disagreement in RP records. It states that EOP will reconcile its NSEP service information with users and vendors, but vendors will be responsible for reconciling their information with their subcontractors. It states that information confirming NSEP service completion will be stored in EOP's MIS and reconciled against the prime service vendor.[34] If no information is received, EOP will send a reminder notice to the vendor. NCS states that EOP wants to initiate reconciliation no more than once a year with each prime service vendor. It adds that vendors with subcontractors will be responsible for reconciliation with those subcontractors at least once every three years and will provide confirmation to the EOP that this has been done. NCS too would add a definition for reconciliation in Section 3, as well as a requirement for vendor mutual cooperation. NCS Comments pp. 14-15. NCS offers a new Section [6(f)(7)(f)] which states, "Periodically initiating reconciliation with their subcontractors, and by their subcontractors cooperating with other service vendors during reconciliation."

94. In its reply, AT&T interprets NCS' proposed general duty on vendors to supply reconciliation data to require carriers to reconcile circuits with LECs which provide access channels at each end of each circuit, increasing the vendor's burden. AT&T claims that data systems do not distinguish between prime and subcontractor priority circuits. Also, AT&T says, vendors will take on an increasing share of government circuits and they will have to develop a major MIS to accommodate NCS' requirement for reconciliation. AT&T asserts that the cost-causer for reconciliation is NCS. AT&T suggests that completion reports during the "turn up" phase of TSP service will provide adequate confidence that the database will be reliable, so that reconciliation need only apply to newly entered data. It also proposes that reconciliation address only circuits for which some order activity has occurred within the 12-month period preceding the reconciliation report, with no review needed except in the event of trouble. Under NCS' proposal, AT&T asserts, reconciliation would grow each year, whereas by AT&T's proposal the magnitude would remain constant. AT&T also suggests that there be no reconciliation on RP System circuits until TSP is fully operational, at which time a one-time reconciliation of transitioned circuits followed by reconciliation of new circuits could occur.

95. GTE favors reconciliation, stating that such procedures are needed to ensure ongoing quality and accuracy of the TSP System. It, like AT&T, would ascribe billing for reconciliation to NCS. GTE urges that billing arrangements between contractors and subcontractors be worked out before TSP is implemented. It expects that contractors' costs will be higher because they must expend more effort in the reconciliation process. GTE Comments, 14. For its part, McCaw finds NCS' use of "by their subcontractors" in its new proposed Section [6(f)(7(f)] unclear in that it may mean prime contractors must ensure subcontractors or other service vendors cooperate with such vendors, or other possible interpretations. McCaw also asks whether Section 10(b)(3) [9(b)(3)] allows a subcontractor to act without EOP identification and what the possible consequences of violation would be. It suggests that subcontractors be similarly restrained and prime contractors should be required to forward priorities to subcontractors.

96. Southwestern Bell, in its reply, concurs with Pacific Bell that EOP should be responsible for discrepancies between EOP records and service users' and vendors' records. It asks that NCS be required to track TSPs and determine, via completed order notification, that requested service has been connected. It also supports reconciliation annually between NCS and prime contractors and every three years between prime contractors and subcontractors. The burden of identifying and re-validating TSP users every 3 years should be NCS' and service users' responsibility, Southwestern Bell asserts. USTA emphasizes the importance of restricting priority assignments and urges the government to monitor assignments and periodically reassessing priority classifications.

97. In its reply, NCS disagrees with BellSouth regarding review of billing discrepancies and reconciliation matters, arguing that EOP would rarely, if ever, become involved with billing disputes. NCS also disagrees with US West regarding who should conduct audits; NCS says only EOP should conduct them. In response to Pacific Bell's suggestion that priority level assignments be retained by the NCS in its MIS database, NCS notes that Section 6(b)(2)(c) states that EOP is responsible for maintaining data on priority level assignments, so that no modification is needed. NCS also offers a number of minor editorial amendments, which generally will be adopted.

98. *Discussion.* Most parties do not dispute the need for a centralized administrative mechanism for resolving recordkeeping inconsistencies or discrepancies, and we agree that NCS is the logical entity to administer such a mechanism.[35] However, an apparent problem with NCS' original proposal was its use of the word "audit" in Section 3(b). As proposed, audit was defined as "a periodic review, as mutually agreed, in response to identified problems." NCS' intent was that, in the event of an inconsistency or problem with a priority, NCS would investigate and, with the assistance of all parties, resolve the problem, which would generally consist of reported or suspected data discrepancies. Several commenting parties have interpreted audit to mean a review in an extended tax sense, *i.e.*, an exhaustive examination and tabulation.[36] In apparent anticipation of these interpretations, NCS offers a revised Section 3(b) as follows:

> Audit means a quality assurance review in response to identified problems.

We agree that this revised Section 3(b) sufficiently clarifies the intent of the audit function.

99. The problems associated with reconciliation of errors or discrepancies in databases maintained by innumerable parties are potentially significant. Apart from audits, which are essentially troubleshooting exercises, reconciliations will be initiated by EOP to assure that database records amongst all TSP participants comport. It is generally agreed that reconciliations should be initiated no more than once a year between EOP and each prime service vendor, with subcontractor-vendor reconciliation at least once every three years, and written confirmation to EOP. Hence, while "periodically" is not defined in the rules, we will expect reconciliations to be initiated by EOP in accordance with this understanding. It is not likely NCS will engage, however, in audits concerning matters of billing except as a user, in which case it would seek redress or correction as would any other user. Coupled with our statement of the purpose of audits, we believe the concerns expressed by Ameritech,[37] AT&T, BellSouth, GTE,[38] Pacific Bell,[39] Southwestern Bell[40] and US West are effectively answered.

100. *Implementation.* We discussed in the NRPM the periods needed to achieve initial operating capability (IOC) and full operating capability (FOC) of the TSP System. We concluded that, based on industry meetings and NCS' comments, IOC at 90 days after FCC rule adoption appeared reasonable. Given the nation's need to proceed with these important NSEP-TSP rules and the purported interest of parties to move forward with assignments, we stated that any request for delay must be well justified. We also indicated that while we tentatively favor a 90 day implementation date, with a sunset provision of July 1, 1990 for the RP System, the final rules would not be put in place until we are satisfied all legitimate concerns have been addressed. We asked for public comment on these matters, particularly urging any party not agreeing with the 90 day IOC date to substantiate its assertion.

101. AT&T, with whom GTE agrees, asserts that the 90 day IOC and July 1, 1990 sunset dates do not leave adequate time for development of systems necessary to implement the TSP System. Algorithms must be developed by NCS to establish, maintain and administer TSP, order entry systems must be developed, new databases created, personnel instructed, operating procedures created and tariffs developed and filed, they say. AT&T and GTE suggest a 12 month IOC (after FCC rule adoption) and sunset two-and-a-half years later. Ameritech adds that less than 1 year for IOC would jeopardize the accuracy of identifying TSP services, increasing costs of development (two stages would then be needed). Bell Atlantic agrees that one year is needed to avoid using a cumbersome and inaccurate manual system. BellCore emphasizes the need to develop software for the BOCs, which involves design parameters such as flow of information between government and industry. It suggests that once TSP is initiated minor problems can be handled by abbreviated proceedings at the Commission, but in any case one year for IOC is needed for smooth transition from RP to TSP.

102. BellSouth urges the Commission to be flexible as to TSP implementation to permit carriers to modify mechanized systems to meet the specifications of TSP and implement necessary tariffs and other procedures. Both BellSouth and Nynex recommend IOC one year after issuance of the final rules. GTE and Pacific Bell also urge one year, but note that until FCC final rules and FCC approval of NCS-generated implementing procedures are finished, no planning can be done. GTE argues that the IOC date must be measured from when implementing procedures are completed, including training, software development, internal procedure preparation, and tariff development and filing. Pacific Bell would require NCS to provide TSP specifications within 90 days of the rules and the data should be subject to further comment. Arinc, Centel and USTA express concern regarding the relationship between RP and TSP during the transition period, *i.e.*, which dominates.

103. McCaw and Telocator state that cellular vendors are prepared to implement TSP on 90 days notice after FCC action on the rules. McCaw urges that prompt implementation is needed to assure integrated rules for all. It emphasizes, however, that only IOC is possible 90 days after rule adoption. FOC will take longer, it states, because cellular vendors will need to begin to supply NSEP

services and generate the associated revenue to facilitate the evolution to FOC. MCI states that time is needed to develop some systems, such as the means by which NCS notifies carriers of a need to re-prioritize circuits. For IOC it prefers one year -- or only after approval of the operations manual which will govern carrier obligations. Ameritech urges that the federal government's new inventory system for communications circuits should be in place first, to permit generation of usable TSP classification requests. It favors a rapid transition to the new system, with one year for IOC and 60 days for sunset of RP. For its part, Southwestern Bell suggests that 4-6 months are needed for NCS adoption and FCC approval of operational and vendor-interface rules, and then one year is needed for IOC. For its part, USTA urges that there should be a flash cut after FCC final action and after EOP completes and publishes its Directive 3-1 operating procedures, tentatively July 1, 1989, with sunset on January 1, 1990. It opposes simultaneous existence of RP and TSP because of possible differing classifications.

104. In its comments, NCS agrees that a year is needed to complete several essential elements of TSP. The planned NCS Directive 3-1 (which will define use of NSEP TSP Systems, including assignment of responsibilities to NCS) will require, it states, several months to complete and time will also be needed for EOP to develop and implement its automated TSP MIS and prepare training materials. It also notes that tariff filing procedures and industry's need to implement organizational procedures require time. It supports a two-and-a-half year period for transition from RP to TSP, beginning one year after the Commission's final order adopting TSP rules. NCS Comments, p. 5.

105. In its reply comments, AT&T favors an IOC date of 6 months after operating procedures become available, with FOC one year afterwards. BellSouth, BellCore, CBT, Pacific Bell, USTA and US West reiterate the inadequacy of 90 days and the need for an IOC date commencing, alternately, one year after Commission adoption of TSP rules or one year after Commission approval of Operations Procedures (developed by NCS). CTIA supports the notion of permissive TSP implementation and a final FOC date. GTE favors a one year IOC date from Commission approval of rules, and a sunset of RP two and a half years thereafter. US West opposes the need for a two-and-a-half year transition period and suggests instead a six month period, to reduce costs. McCaw, joined by Telocator, argues that cellular operators are under a disadvantage if they cannot implement TSP immediately because they cannot yet restore NSEP services. McCaw asks that the Commission either establish a date by which all vendors must begin TSP while others may begin earlier, or authorize cellular under RP now – until TSP becomes effective. MCI opposes Ameritech's flash cut proposal because there would not be sufficient time to sort out problems endemic in the RP System. It agrees with an IOC date of one year after Commission approval of NCS' Operations Manual. Southwestern Bell supports an IOC date of one year after FCC approval of EOP's operation procedures and a sunset date of six months. It would also require resubmission of RP assignments to EOP by government agencies within 18 months.

106. Also in reply, NCS opposes delaying IOC until Commission approval of TSP Vendor Operating Procedures, arguing that national security and emergency preparedness posture requires more expeditious action. In response to the matter of RP/TSP dominance during the transition, NCS notes that service vendor operational procedures will address this problem by including an RP to TSP restoration priority correlation matrix to show that, during the transition, neither system takes precedence over the other. *See* NCS Reply, p. 26. For example, it notes, an RP of "3C" would, during the transition period, be treated as a TSP restoration priority of "3". NCS favors a sunset period for RP of two-and-a-half years.

107. *Discussion*. Our principal consideration in establishing IOC and FOC dates is to balance the essential public interest need of expeditiously initiating a workable NSEP TSP System with the practical requirements of competent preparation. Our experience with RP and its flawed recordkeeping and skewed priority distribution emphasizes the importance of allowing adequate time for vendors, users and the government to develop and implement the mechanisms they deem necessary to avoid these infirmities in TSP. To do otherwise, in the long run, would disserve the public interest and ultimately invoke corrective measures that would be both costly and dilatory. While we anticipated in the NPRM adoption of a 90 day IOC, with FOC by July 1, 1989, these dates are generally not supportable.

108. The majority of commenting parties favor a one year IOC date. They agree that less time would not be adequate to develop the necessary procedural guidelines and internal operating systems or, where appropriate, obtain regulatory approvals. NCS' concurrence with IOC of one year adds additional weight to the need for this period. The issue that remains with regard to IOC is whether it should commence with Commission adoption of the TSP System rules or with Commission adoption of an order approving NCS' Operations Manual.[41]

109. There is general support for delay of IOC until one year after Commission review of NCS' Operations Manual. *See* para. 35, *supra*. Several parties, including NCS, argue that there is no need to delay that long, and some parties recommend that IOC occur upon Commission adoption of the TSP rules. NCS' position is, in effect, that one year is sufficient time after Commission adoption of TSP rules to allow for review of NCS' procedures, as well as carriers and users to absorb its contents and implement their administrative processes.[42] NCS properly seeks to initiate TSP as quickly as possible, but it has offered no date specific for completion of its administrative guidelines. Nevertheless, in view of its statements concerning current progress on development of procedural guidelines, NCS' stated interest in expediting implementation of TSP and the ongoing work of industry-government representatives in a variety of forums since adoption of the NPRM, we anticipate that a final proposal can be presented by NCS to the Commission for approval within three months of official release of the final TSP rules. An additional nine months from release of such approval should be adequate time for all parties to develop their various internal mechanisms, including software refinements, because many of the details concerning the nature of TSP System requirements are already known. The IOC date, therefore, will be nine months from official release of the Commission's order reviewing NCS' procedural guidelines, which we expect NCS to submit within three months of the Federal Register date of this order.[43] In short, the IOC date will likely be just beyond one year after official release of the TSP rules.

110. We do not agree with McCaw or Telocator that dispensation for historical exclusion from the current program is warranted. Allowing carriers to implement TSP earlier than the IOC date we have established could lead to claims of anticompetitive conduct, with carriers that have developed more detailed or compliant recordkeeping and assignment tracking systems effectively handicapped in the competitive provision of priority services by other vendors that have quickly implemented "makeshift" or minimally compliant systems. The public interest does not support an environment that requires vendors to develop "lowest common denominator" systems to compete effectively. For TSP, it is important that all parties operate under uniform standards and capabilities that will not undermine the long term reliability of TSP System administration or lead to the infirmities we have experienced with RP.[44] Such a policy encourages industry and government to work cooperatively toward implementation of the most effective TSP System possible.

111. It has been suggested by various commenting parties that the FOC date, when all RP priority assignments will have been converted to TSP priority assignments or deleted, should be from 6 to 30 months from the IOC date. The purpose of the FOC period is to establish a transition period that allows RP assignees to seek reassignment under TSP or terminate their priority assignments. There does not appear to be justification for accelerating FOC to 6 months after IOC because once IOC has occurred TSP will be operational and the compelling public interest reasons for developing the RP replacement will have been achieved. A longer FOC period would assure that all RP assignees have sufficient time to adjust to TSP. We do not believe that 30 months is unreasonable and, given the absence of a specific showing that the costs associated with 30 months over 6 months constitute a significant factor not outweighed by the general need for an adjustment period, we will adopt 30 months in Section 2 as the FOC period, *i.e.*, 30 months from IOC. Other issues raised by the parties, *e.g.*, Arinc, Centel and USTA at para. 102, *supra*, have been adequately resolved in earlier discussions and by NCS.

Additional Items

112. *EMP*. Leggett favors the inclusion of electromagnetic pulse (EMP) protection measures in the TSP rules. He argues that EMP would add balance missing from the proposal, *viz*., by a regulatory effort to prevent services from failing rather than relying on restoration procedures. He proposes a new section, Obligation to Protect NSEP Services Against the Effects of an Electromagnetic Pulse, with a requirement that within one year of classification of any NSEP service as Emergency or Essential all associated services and equipment would be EMP protected. In response to Leggett, NCS agrees that users should implement measures that increase survivability of NSEP services, but protection from EMP is not a requirement of the TSP System.

113. EMP is an intense burst of electromagnetic energy that is generated by a high-altitude nuclear explosion. Purportedly, a single burst could blanket the entire continental United States with an intense electromagnetic pulse and disable most solid-state electronic devices, thus rendering many of our telecommunications systems inoperative. In the Bureau's *Memorandum Opinion and Order*, DA 86-305, released December 12, 1986, the Bureau rejected Leggett's request to institute a notice of inquiry [NOI] to consider the effects of EMP on civilian communications systems and to possibly establish countermeasures. It noted that the issues raised were topical and important, but it decided that examination of them was unwarranted because a comprehensive study of EMP was underway by NSTAC and the American National Standards Institute (ANSI). The Bureau also noted the limited interest displayed by the public and lack of a *prima facie* showing by Leggett that the public interest would be served by requiring a public forum.

114. On reconsideration, 2 FCC Rcd 2739 (1987), the Commission stated that the seriousness of the EMP problem causes us to defer to activities currently underway in other forums. We also stated that the sensitivity of EMP and its national security implications weigh against a public proceeding. This position was supported by the Department of Defense (DoD), which has primary responsibility for the nation's security. As DoD stated, " . . . much of the details regarding the impact of EMP and mitigation measures is classified national security information not properly debated in a regulatory proceeding." *Id*. at 2740. The Commission interpreted the paucity of participation in the proceeding to reflect the collective inclination of the private sector to rely on NSTAC and ANSI to take the lead in the development of EMP policy. "In short, we are not convinced that in view of other ongoing EMP studies there is an immediate need to institute an NOI." *Id*. We believe the rationale applied in the Commission's reconsideration of Leggett's petition in 1987 also applies to Leggett's proposed TSP rule now before us. Nothing has been shown to have changed since the Commission issued its reconsideration of Leggett's EMP petition. We will therefore reject his request.

115. *FAR*. Pacific Bell notes that the Federal Acquisition Regulations (FAR) contain procedures for federal procurement of goods and services. It asks the extent to which service vendors can respond to emergency procurement though the FAR has not been followed, *i.e.*, are they liable for not following the FAR? Pacific Bell also refers to Section 6(f)(7)(b), suggesting that "with proper contracting activities" is unclear and asking whether these refer to authorities or procedures. In that Section 6(f)(7)(b) has been modified in the appendix *(see* Section [6(f)(8)(b)]), Pacific Bell's question is moot. The matter of FAR as raised by Pacific Bell is not within the scope of this Commission's jurisdiction, *i.e.*, through Title II of the Communications Act. EOP may wish to offer guidance to users or vendors on issues involving compliance with FAR.

116. *Sponsorship*. AAR asks that privately owned services of the railroad industry be included in the TSP System. It notes that the Peacekeeper Rail Garrison depends on railroads to provide highly survivable and capable strategic weapons systems, and relies heavily on communications. It states that it is important that non-Federal users not be without recourse in matters of restoration of their telecommunications. UTC expresses concern that some utilities, *e.g.*, water companies, seeking priority classification without sponsorship must apply to EOP. It recommends, without further explanation, that such application be made directly to the Commission.

117. As discussed earlier herein, *e.g.*, at paras. 23-26, TSP offers a means by which carriers may provide priority provisioning or restoration service to a user without violating the unreasonable preference prohibition of Title II of the Communications Act. Private services, *i.e.*, services not

offered by a common carrier, would not be subject to allegations of unreasonable preferences under Title II of the Communications Act and therefore would not require the protection of TSP. Indeed, the scope of TSP is predicated on the need for a standardized system of issuing priorities to common carriers and is not intended to be applied by the Commission to non-common carriers.

118. Private telecommunications owners may offer their communications services alone or in conjunction with leased common carrier services. In either case, as noted above, these private offerings are not generally within the scope of TSP.[45] However, Section [4(c)], as proposed, permits users to "apply" the TSP System to any private service offering, provided the private service does not connect to other services that have been properly assigned a TSP priority level. *See* Sections [4(c)(1)] and [2]. There is no prohibition against private carriers using TSP System standards and procedures in conjunction with services they provide their users, even if those users also are TSP users. The private carriers, however, will not derive any of the legal benefits that a common carrier gains from compliance with the TSP System.[46] Railroads, utilities and others that own private communications systems and that wish to offer priority provisioning or restoration treatment in conjunction with their private service offerings must do so independently of formal TSP procedures, *e.g.*, by contract. Under the proposed TSP System, it is not contemplated that the Commission will accept applications for, or review, non-common carrier priority assignments. On the other hand, we do not wish to discourage the use of the TSP rules as guidance for such private agreements. Proposed Section [4(c)] would offer this guidance. Accordingly, we will adopt Section [4(c)] as proposed. As to UTC's preference that certain entities apply directly to the Commission for TSP priority level assignment, we note that Sections 6(a)(4) and 6(e) offer mechanisms for entities that cannot otherwise secure the sponsorship of a federal agency. Thus, were an energy or water utility not able to secure the sponsorship of the Department of Energy, it could seek Commission sponsorship, or it could choose under Section 6(e) to submit its request directly to EOP.

119. *Notification, revalidation, verification and back - up.* US West suggests deletion of the provision in Section 13(b)(2)(b) [12(b)(2)(b)] that, after 30 days, priority level E services are revoked unless extended. It argues that the requirement for written notice to carriers is redundant and could be costly to TSP service users. It asks whether the E level classification which provisioned the service would be required for subsequent changes in the service, absent the same urgency as originally required. It also asks whether the 3 year revalidation requirement for priority assignments is a responsibility of carriers. Finally, US West asks whether the three time periods of TSP means that there is a requirement for contingent priority levels. It states that carriers do not have the ability to accept orders for contingent priorities, only one at a time, and that changes in priority levels from changes in time periods or stress conditions will require subsequent service requests to alter priority levels.

120. UTC states that it is not clear whether utilities' special needs for back-up common carrier services fall within the additional justification requirement of Section 13(d) [12(d)]. It requests amendment of the proposal to permit utility back-up services to satisfy the "additional justification" requirement. In its reply comments, BellCore suggests that the Section 13(b)(2)(c) [12(b)(2)(c)] emergency restoration 30 day priority option should be deleted and assigned under the same operational arrangements as other TSP restoration priority circuits. It claims that no priority assignments should be automatic. BellCore and Southwestern Bell concur with US West that contingent priorities cannot be maintained without great expense and likely confusion.

121. NCS disagrees with US West concerning Section 13(b)(2)(b) [12(b)(2)(b)] and states that EOP will revoke E after 30 days and notify the user unless the user requests an extension. It further states that the user must transmit notice of the revocation to the vendor. Relying on vendors to automatically change priorities on dates would burden vendors to maintain tickler files, NCS argues. It concludes that the better practice is to require notice of any such revocation. Also, it adds, no revision is needed to clarify the rules in response to US West's question about whether E need be issued for subsequent changes, even if changes do not have the same urgency as the original requisition. NCS says subsequent changes must be separately justified. We believe NCS' response adequately reflects a reasonable approach to these matters and we will not alter the language proposed. If after adoption of the TSP rules interested parties find that there are improvements possible that would justify instituting a proceeding to amend the rules, they are welcome to submit the appropriate petitions.

122. As to contingent assignments, NCS notes that Section 5 states that although priority levels normally will be assigned by EOP and retained by service vendors only for the current time period, if a user wants to activate a contingent priority a service order will be issued to the vendor. This is treated like any priority level change in that a new service order is needed, NCS states. Vendors will not need to maintain contingent assignments in their databases. We believe this sufficiently responds to the concerns of parties regarding contingent priorities. In response to Pacific Bell, which asks for a definition of who is authorized to seek verification of a priority level, NCS states that EOP will generally do so. As to US West's question concerning revalidation, NCS states that users are responsible for rejustifying their priority level assignments with EOP at least once every 3 years, and that any changes require a service order to the vendor. Finally, we do not believe that utilities require special interpretation of Section 13(d) [12(d)] so that UTC's question concerning its need for back-up services is a matter that can be taken up with EOP or its sponsoring agency as the need arises.

V. CONCLUSION

123. By the rules we adopt in this order we initiate a program that modernizes the means by which the nation is assured that essential communications facilities provided by common carriers receive provisioning and restoration priorities in times of emergency. The rules may also serve as guidance for the provisioning and restoration of private systems. NCS has provided the basis for the rules that we adopt and will soon offer for Commission approval its procedures for implementation. Through the substantive participation of carriers, users and government, many complicated legal and technical issues have been resolved in this proceeding, resulting in a number of changes to the proposed rules. It is anticipated that, with these changes,

the TSP System will provide a uniform and efficient means of providing preferences to qualified users in response to the nation's emergency communications needs.[47]

VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

124. *Reason for action.* The Commission is responding to deficiencies in the existing Restoration Priority System and adopting a Telecommunications Services Priority System by which carriers may provide priority provisioning and restoration of service when specific National Security Emergency Preparedness needs have been identified. These rules will allow carriers to "discriminate" among services and users when NSEP is involved without violating the provisions of the Communications Act.

125. *Objectives.* The objective of this proceeding is to ensure that NSEP telecommunications needs are adequately handled without unduly interfering with the public's telecommunications needs.

126. *Legal Basis.* The legal authority for this action is contained in Sections 1, 4(i), 201-05 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-05 and 303(r).

127. *Description, potential impact and number of small entities affected.* The impact of the new TSP rules upon large and small telecommunications providers will vary depending upon the number of NSEP services they provide. The burden hours, estimated at 105,000 annually, will be assumed by NCS/DoD which will handle essential administration and review of priority applications and overall implementation. The economic impact of the rules will be minimal on carriers because they will recover their costs through cost-causative cost recovery mechanisms. Further, once the carriers have adapted to the new rules, the economic impact should be minimal.

128. *Recording, recordkeeping and other compliance requirements.* The Executive Office of the President will be responsible for maintaining the database for TSP. All recording, recordkeeping and compliance records will be handled by the Executive Office of the President, with continuing access by the Commission. Carriers will be required to maintain records of their priorities, which in some cases may require development of new software. Costs for such development will be recovered through standard cost recovery mechanisms.

129. *Federal rules that overlap, duplicate, or conflict with these rules:* None.

130. *Any significant alternatives minimizing impact on small entities and consistent with stated objective:* None.

VII. ORDER

131. Accordingly, IT IS ORDERED, That pursuant to authority contained in Sections 1, 4(i), 201-05 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-05 and 303(r), Parts 0 and 64 of the Commission's Rules and Regulations ARE AMENDED as set forth in the Appendix below effective **December 23, 1988.**

132. IT IS FURTHER ORDERED, That the initial operating capability date of these rules will be nine months after the appearance in the Federal Register of the Commission's order concerning the Executive Office of the President's procedures for implementation.

133. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau IS DELEGATED AUTHORITY to participate in and conduct discussions and meetings and issue orders to resolve issues in connection with implementation of the Telecommunications Service Priority System.

134. IT IS FURTHER ORDERED, That the Secretary shall cause a summary of this decision to be printed in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

APPENDIX

A. Part 0 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 0) is amended as follows:

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, unless otherwise noted.

2. § 0.11(a)(10) is revised to read as follows:

§ 0.11 Functions of the Office.

(a)* * *

(10) Under the general direction of the Defense Commissioner, coordinate the defense activities of the Commission, including recommendation of national emergency plans and preparedness programs covering Commission licensees and planning for continuity of essential Commission functions during national emergency conditions. Support the Chief, Common Carrier Bureau on matters involving assignment of Telecommunications Service Priority System priorities and in the administration of that System. Act as FCC Defense Coordinator and principal to the National Communications System.

* * * * *

3. §0.91 is amended by adding new paragraph (l) to read as follows:

§0.91 Functions of the Bureau.

* * * * *

(l) Administers the Telecommunications System Priority System with the concurrence of the Office of the Managing Director, and resolves matters involving assignment of priorities and other issues pursuant to Part 64 of the rules.

4. § 0.314(g) is revised to read as follows:

§ 0.314 Additional authority delegated.

* * * * *

(g) To act on and make determinations on behalf of the Commission regarding requests for assignments and reassignments of priorities under the Telecommunications Service Priority System, Part 64 of the rules, when circumstances require immediate action and the common carrier seeking to provide service states that it cannot contact the National Communications System or the Commission office normally responsible for such assignments.

* * * * *

B. Part 64 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 64) is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, unless otherwise noted.

2. § 64.401 is revised to read as follows:

§ 64.401 Policies and procedures for provisioning and restoring certain telecommunications services in emergencies.

The communications common carrier shall maintain and provision and, if disrupted, restore facilities and services in accordance with policies and procedures set forth in the Appendix to this part.

3. § 64.402 is removed.

4. Appendix B to Part 64 is removed.

5. Appendix A to Part 64 is revised to read as follows:

APPENDIX - Telecommunications Service Priority (TSP) System for National Security Emergency Preparedness (NSEP)

1. Purpose and Authority.

a. This appendix establishes policies and procedures and assigns responsibilities for the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System. The NSEP TSP System authorizes priority treatment to certain domestic telecommunications services (including portions of U.S. international telecommunication services provided by U.S. service vendors) for which provisioning or restoration priority (RP) levels are requested, assigned, and approved in accordance with this appendix.

b. This appendix is issued pursuant to Sections 1, 4(i), 201 through 205 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201 through 205 and 303(r). These sections grant to the Federal Communications Commission (FCC) the authority over the assignment and approval of priorities for provisioning and restoration of common carrier-provided telecommunications services. Under Section 706 of the Communications Act, this authority may be superseded, and expanded to include non-common carrier telecommunication services, by the war emergency powers of the President of the United States. This appendix provides the Commission's Order to telecommunication service vendors and users to comply with policies and procedures establishing the NSEP TSP System, until such policies and procedures are superseded by the President's war emergency powers. This appendix is intended to be read in conjunction with regulations and procedures that the Executive Office of the President* issues (1) to implement responsibilities assigned in Section 6(b) of this appendix, or (2) for use in the event this appendix is superseded by the President's war emergency powers.

c. Together, this appendix and the regulations and procedures issued by the Executive Office of the President establish one uniform system of priorities for provisioning and restoration of NSEP telecommunication services both before and after invocation of the President's war emergency powers. In order that government and industry resources may be used effectively under all conditions, a single set of rules, regulations, and procedures is necessary, and they must be applied on a day-to-day basis to all NSEP services so that the priorities they establish can be implemented at once when the need arises.

*In Sections 2(a)(2) and 2(b)(2) of Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions" April 3, 1984 (49 Fed. Reg. 13471 (1984)), the President assigned to the Director, Office of Science and Technology Policy, certain NSEP telecommunication resource management responsibilities. The term "Executive Office of the President" as used in this appendix refers to the official or organization designated by the President to act on his behalf.

2. Applicability and Revocation.

a. This appendix applies to NSEP telecommunications services:

(1) For which initial or revised priority level assignments are requested pursuant to Section 8 of this appendix.

(2) Which were assigned restoration priorities under the provision of FCC Order 80-581; 81 FCC 2d 441 (1980); 47 CFR Part 64, Appendix A, "Priority System for the Restoration of Common Carrier Provided Intercity Private Line Services"; and are being resubmitted for priority level assignments pursuant to Section 10 of this appendix. (Such services will retain assigned restoration priorities until a resubmission for a TSP assignment is completed or until the existing RP rules are terminated.)

b. FCC Order 80-581 will continue to apply to all other intercity, private line circuits assigned restoration priorities thereunder until the fully operating capability date of this appendix, 30 months after the initial operating capability date referred to in subsection d of this Section.

c. In addition, FCC Order, "Precedence System for Public Correspondence Services Provided by the Communications Common Carriers" (34 Fed. Reg. 17292 (1969)); (47 CFR Part 64, Appendix B), is revoked as of the effective date of this appendix.

d. The initial operating capability (IOC) date for NSEP TSP will be nine months after release in the Federal Register of the FCC's order following review of procedures submitted by the Executive Office of the President. On this IOC date requests for priority assignments generally will be accepted only by the Executive Office of the President.

3. Definitions.

As used in this part:

a. *Assignment* means the designation of priority level(s) for a defined NSEP telecommunications service for a specified time period.

b. *Audit* means a quality assurance review in response to identified problems.

c. *Government* refers to the Federal government or any foreign, state, county, municipal or other local government agency or organization. Specific qualifications will be supplied whenever reference to a particular level of government is intended (e.g., "Federal government", "state government"). "Foreign government" means any sovereign empire, kingdom, state, or independent political community, including foreign diplomatic and consular establishments and coalitions or associations of governments (e.g., North Atlantic Treaty Organization (NATO), Southeast Asian Treaty Organization (SEATO), Organization of American States (OAS), and government agencies or organization (e.g., Pan American Union, International Postal Union, and International Monetary Fund)).

d. *National Communications System (NCS)* refers to that organization established by the President in Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions," April 3, 1984, 49 Fed. Reg. 13471 (1984).

e. *National Coordinating Center (NCC)* refers to the joint telecommunications industry-Federal government operation established by the National Communications System to assist in the initiation, coordination, restoration, and reconstitution of NSEP telecommunication services or facilities.

f. *National Security Emergency Preparedness (NSEP)* telecommunications services," or "NSEP services," means telecommunication services which are used to maintain a state of readiness or to respond to and manage any event or crisis (local, national, or international), which causes or could cause injury or harm to the population, damage to or loss of property, or degrades or threatens the NSEP posture of the United States. These services fall into two specific categories, Emergency NSEP and Essential NSEP, and are assigned priority levels pursuant to Section 9 of this appendix.

g. *NSEP Treatment* refers to the provisioning of a telecommunication service before others based on the provisioning priority level assigned by the Executive Office of the President.

h. *Priority Action* means assignment, revision, revocation, or revalidation by the Executive Office of the President of a priority level associated with an NSEP telecommunications service.

i. *Priority Level* means the level that may be assigned to an NSEP telecommunications service specifying the order in which provisioning or restoration of the service is to occur relative to other NSEP and/or non-NSEP telecommunication services. Priority levels authorized by this appendix are designated (highest to lowest) "E," "1," "2," "3," "4," and "5" for provisioning and "1," "2," "3," "4," and "5" for restoration.

j. *Priority Level Assignment* means the priority level(s) designated for the provisioning and/or restoration of a particular NSEP telecommunications service under Section 9 of this appendix.

k. *Private NSEP Telecommunications Services* include non-common carrier telecommunications services including private line, virtual private line, and private switched network services.

l. *Provisioning* means the act of supplying telecommunications service to a user, including all associated transmission, wiring and equipment. As used herein, "provisioning" and "initiation" are synonymous and include altering the state of an existing priority service or capability.

m. *Public Switched NSEP Telecommunications Services* include those NSEP telecommunications services utilizing public switched networks. Such services may include both interexchange and intraexchange network facilities (*e.g.*, switching systems, interoffice trunks and subscriber loops).

n. *Reconciliation* means the comparison of NSEP service information and the resolution of identified discrepancies.

o. *Restoration* means the repair or returning to service of one or more telecommunication services that have experienced a service outage or are unusable for any reason, including a damaged or impaired telecommunications facility. Such repair or returning to service may be done by patching, rerouting, substitution of component parts or pathways, and other means, as determined necessary by a service vendor.

p. *Revalidation* means the rejustification by a service user of a priority level assignment. This may result in extension by the Executive Office of the President of the expiration date associated with the priority level assignment.

q. *Revision* means the change of priority level assignment for an NSEP telecommunications service. This includes any extension of an existing priority level assignment to an expanded NSEP service.

r. *Revocation* means the elimination of a priority level assignment when it is no longer valid. All priority level assignments for an NSEP service are revoked upon service termination.

s. *Service Identification* refers to the information uniquely identifying an NSEP telecommunications service to the service vendor and/or service user.

t. *Service User* refers to any individual or organization (including a service vendor) supported by a telecommunications service for which a priority level has been requested or assigned pursuant to Section 8 or 9 of this appendix.

u. *Service Vendor* refers to any person, association, partnership, corporation, organization, or other entity (including common carriers and government organizations) that offers to supply any telecommunications equipment, facilities, or services (including customer premises equipment and wiring) or combination thereof. The term includes resale carriers, prime contractors, subcontractors, and interconnecting carriers.

v. *Spare Circuits or Services* refers to those not being used or contracted for by any customer.

w. *Telecommunication Services* means the transmission, emission, or reception of signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, visual or other electronic, electric, electromagnetic, or acoustically coupled means, or any combination thereof. The term can include necessary telecommunication facilities.

x. *Telecommunications Service Priority (TSP) System User* refers to any individual, organization, or activity that interacts with the NSEP TSP System.

4. Scope.

a. *Domestic NSEP Services*. The NSEP TSP System and procedures established by this appendix authorize priority treatment to the following domestic telecommunication services (including portions of U.S. international telecommunication services provided by U.S. vendors) for which provisioning or restoration priority levels are requested, assigned, and approved in accordance with this appendix:

(1) Common carrier services which are:

(a) Interstate and foreign telecommunications services.

(b) Intrastate telecommunication services inseparable from interstate or foreign telecommunications services, and intrastate telecommunication services to which priority levels are assigned pursuant to Section 9 of this appendix.

NOTE: Initially, the NSEP TSP System's applicability to public switched services is limited to (a) provisioning of such services (*e.g.*, business, centrex, cellular, foreign exchange, Wide Area Telephone Service (WATS) and other services that the selected vendor is able to provision) and (b) restoration of services and components of services that the selected vendor is able to restore.

(2) services which are provided by government and/or non-common carriers and are interconnected to common carrier services assigned a priority level pursuant to Section 9 of this appendix.

b. *Control services and orderwires*. The NSEP TSP System and procedures established by this appendix are not applicable to authorize priority treatment to control services or orderwires owned by a service vendor and needed for provisioning, restoration, or maintenance of other services owned by a service vendor. Such control services and orderwires shall have priority provisioning and restoration over all other telecommunication services (including NSEP services) and shall be exempt from preemption. However, the NSEP TSP System and procedures established by this appendix are applicable to control services or orderwires leased by a service vendor.

c. *Other Services*. The NSEP TSP System may apply, at the discretion of and upon special arrangements by the NSEP TSP System users involved, to authorize priority treatment to the following telecommunication services:

(1) Government or non-common carrier services which are not connected to common carrier provided services assigned a priority level pursuant to Section 9 of this appendix.

(2) Portions of U.S. international services which are provided by foreign correspondents. (U.S. telecommunication service vendors are encouraged to ensure that relevant operating arrangements are consistent to the maximum extent practicable with the NSEP TSP System. If such arrangements do not exist, U.S. telecommunication service vendors should handle service provisioning and/or restoration in accordance with any system acceptable to their foreign correspondents which comes closest to meeting the procedures established in this appendix.)

5. Policy.

The NSEP TSP System is the regulatory, administrative, and operational system authorizing and providing for priority treatment, *i.e.*, provisioning and restoration, of NSEP telecommunication services. As such, it establishes the framework for telecommunication service vendors to provision, restore, or otherwise act on a priority basis to ensure effective NSEP telecommunication services. The NSEP TSP System allows the assignment of priority levels to any NSEP service across three time periods, or stress conditions: Peacetime/Crisis/Mobilization, Attack/War, and Post-Attack/Recovery. Although priority levels normally will be assigned by the Executive Office of the President and retained by service vendors only for the current time period, they may be preassigned for the other two time periods at the request of service users who are able to identify and justify in advance, their wartime or post-attack NSEP telecommunication requirements. Absent such preassigned priority levels for the Attack/War and Post-Attack/Recovery periods, priority level assignments for the Peacetime/Crisis/Mobilization period will remain in effect. At all times, priority level assignments will be subject to revision by the FCC or (on an interim basis) the Executive Office of the President, based upon changing NSEP needs. No other system of telecommunication service priorities which conflicts with the NSEP TSP System is authorized.

6. Responsibilities.

a. The FCC will:

(1) Provide regulatory oversight of implementation of the NSEP TSP System.

(2) Enforce NSEP TSP System rules and regulations, which are contained in this appendix.

(3) Act as final authority for approval, revision, or disapproval of priority actions by the Executive Office of the President and adjudicate disputes regarding either priority actions or denials of requests for priority actions by the Executive Office of the President, until superseded by the President's war emergency powers under Section 706 of the Communications Act.

(4) Function (on a discretionary basis) as a sponsoring Federal organization. (*See* Section 6(c) below.)

b. The Executive Office of the President will:

(1) During exercise of the President's war emergency powers under Section 706 of the Communications Act, act as the final approval authority for priority actions or denials of requests for priority actions, adjudicating any disputes.

(2) Until the exercise of the President's war emergency powers, administer the NSEP TSP System which includes:

(a) Receiving, processing, and evaluating requests for priority actions from service users, or sponsoring Federal government organizations on behalf of service users (e.g., Department of State or Defense on behalf of foreign governments, Federal Emergency Management Agency on behalf of state and local governments, and any Federal organization on behalf of private industry entities). Action on such requests will be completed within 30 days of receipt.

(b) Assigning, revising, revalidating, or revoking priority levels as necessary or upon request of service users concerned, and denying requests for priority actions as necessary, using the categories and criteria specified in Section 12 of this appendix. Action on such requests will be completed within 30 days of receipt.

(c) Maintaining data on priority level assignments.

(d) Periodically forwarding to the FCC lists of priority actions by the Executive Office of the President for review and approval.

(e) Periodically initiating reconciliation.

(f) Testing and evaluating the NSEP TSP System for effectiveness.

(g) Conducting audits as necessary. Any Telecommunications Service Priority (TSP) System user may request the Executive Office of the President to conduct an audit.

(h) Issuing, subject to review by the FCC, regulations and procedures supplemental to and consistent with this appendix regarding operation and use of the NSEP TSP System.

(i) Serving as a centralized point-of-contact for collecting and disseminating to all interested parties (consistent with requirements for treatment of classified and proprietary material) information concerning use and abuse of the NSEP TSP System.

(j) Establishing and assisting a TSP System Oversight Committee to identify and review any problems developing in the system and recommend actions to correct them or prevent recurrence. In addition to representatives of the Executive Office of the President, representatives from private industry (including telecommunication service vendors), state and local governments, the FCC, and other organizations may be appointed to that Committee.

(k) Reporting at least quarterly to the FCC and TSP System Oversight Committee, together with any recommendations for action, the operational status of and trends in the NSEP TSP System, including:

(i) Numbers of requests processed for the various priority actions, and the priority levels assigned.

(ii) Relative percentages of services assigned to each priority level under each NSEP category and subcategory.

(iii) Any apparent serious misassignment or abuse of priority level assignments.

(iv) Any existing or developing problem.

(l) Submitting semi-annually to the FCC and TSP System Oversight Committee a summary report identifying the time and event associated with each invocation of NSEP treatment under Section 9(c) of this appendix, whether the NSEP service requirement was adequately handled, and whether any additional charges were incurred. These reports will be due by April 30th for the preceding July through December and by October 31st for the preceding January through June time periods.

(m) All reports submitted to the FCC should be directed to Chief, Domestic Services Branch, Common Carrier Bureau, Washington, D.C. 20554.

(3) Function (on a discretionary basis) as a sponsoring Federal organization. (*See* Section 6(c) below.)

c. Sponsoring Federal organizations will:

(1) Review and decide whether to sponsor foreign, state, and local government and private industry (including telecommunication service vendors) requests for priority actions. Federal organizations will forward sponsored requests with recommendations or disposition to the Executive Office of the President. Recommendations will be based on the categories and criteria in Section 12 of this appendix.

(2) Forward notification of priority actions or denials of requests for priority actions from the Executive Office of the President to the requesting foreign, state, and local government and private industry entities.

(3) Cooperate with the Executive Office of the President during reconciliation, revalidation, and audits.

(4) Comply with any regulations and procedures supplemental to and consistent with this appendix which are issued by the Executive Office of the President.

d. Service users will:

(1) Identify services requiring priority level assignments and request and justify priority level assignments in accordance with this appendix and any supplemental regulations and procedures issued by the Executive Office of the President that are consistent with this appendix.

(2) Request and justify revalidation of all priority level assignments at least every three years.

(3) For services assigned priority levels, ensure (through contractual means or otherwise) availability of customer premises equipment and wiring necessary for end-to-end service operation by the service due date, and continued operation; and, for such services in the Emergency NSEP category, by the time that vendors are prepared to provide the services. Additionally, designate the organization responsible for the service on an end-to-end basis.

(4) Be prepared to accept services assigned priority levels by the service due dates or, for services in the Emergency NSEP category, when they are available.

(5) Pay vendors any authorized costs associated with services that are assigned priority levels.

(6) Report to vendors any failed or unusable services that are assigned priority levels.

(7) Designate a 24-hour point-of-contact for matters concerning each request for priority action and apprise the Executive Office of the President thereof.

(8) Upon termination of services that are assigned priority levels, or circumstances warranting revisions in priority level assignment (e.g., expansion of service), request and justify revocation or revision.

(9) When NSEP treatment is invoked under Section 9(c) of this appendix, within 90 days following provisioning of the service involved, forward to the National Coordinating Center *(see* Section 3(e) of this appendix) complete information identifying the time and event associated with the invocation and regarding whether the NSEP service requirement was adequately handled and whether any additional charges were incurred.

(10) Cooperate with the Executive Office of the President during reconciliation, revalidation, and audits.

(11) Comply with any regulations and procedures supplemental to and consistent with this appendix that are issued by the Executive Office of the President.

e. Non-federal service users, in addition to responsibilities prescribed above in Section 6(d), will obtain a sponsoring Federal organization for all requests for priority actions. If unable to find a sponsoring Federal organization, a non-federal service user may submit its request, which must include documentation of attempts made to obtain a sponsor and reasons given by the sponsor for its refusal, directly to the Executive Office of the President.

f. Service vendors will:

(1) When NSEP treatment is invoked by service users, provision NSEP telecommunication services before non-NSEP services, based on priority level assignments made by the Executive Office of the President. Provisioning will require service vendors to:

(a) Allocate resources to ensure best efforts to provide NSEP services by the time required. When limited resources constrain response capability, vendors will address conflicts for resources by:

(i) Providing NSEP services in order of provisioning priority level assignment (i.e., "E", "1", "2", "3", "4", or "5");

(ii) Providing Emergency NSEP services (i.e., those assigned provisioning priority level "E") in order of receipt of the service requests;

(iii) Providing Essential NSEP services (i.e. those assigned priority levels "1", "2", "3", "4", or "5") that have the same provisioning priority level in order of service due dates; and

(iv) Referring any conflicts which cannot be resolved (to the mutual satisfaction of servicer vendors and users) to the Executive Office of the President for resolution.

(b) Comply with NSEP service by:

(i) Allocating resources necessary to provide Emergency NSEP services as soon as possible, dispatching outside normal business hours when necessary;

(ii) Ensuring best efforts to meet requested service dates for Essential NSEP services, negotiating a mutually (customer and vendor) acceptable service due date when the requested service due date cannot be met; and

(iii) Seeking National Coordinating Center (NCC) assistance as authorized under the NCC Charter *(see* Section 1.3, NCC Charter, dated October 9, 1985).

(2) Restore switched (*e.g.*, cellular) NSEP telecommunications services which suffer outage, or are reported as unusable or otherwise in need of restoration, before non-NSEP services, based on restoration priority level assignments. (NOTE: For broadband or multiple service facilities, restoration is permitted even though it might result in restoration of services assigned no or lower priority levels along with, or sometimes ahead of, some higher priority level services.) Restoration will require service vendors to restore NSEP services in order of restoration priority level assignment (*i.e.*, "E", "1", "2", "3", "4", "5") by:

(a) Allocating available resources to restore NSEP services as quickly as practicable, dispatching outside normal business hours to restore services assigned priority levels "1," "2," and "3" when necessary, and services assigned priority level "4" and "5" when the next business day is more than 24 hours away;

(b) Restoring NSEP services assigned the same restoration priority level based upon which can be first restored. (However, restoration actions in progress should not normally be interrupted to restore another NSEP service assigned the same restoration priority level);

(c) Patching and/or rerouting NSEP services assigned restoration priority levels from "1" through "5," when use of patching and/or rerouting will hasten restoration;

(d) Seeking National Coordinating Center (NCC) assistance as authorized under the NCC Charter; and

(e) Referring any conflicts which cannot be resolved (to the mutual satisfaction of service vendors and users) to the Executive Office of the President for resolution.

(3) Respond to provisioning requests of customers and/or other service vendors, and to restoration priority level assignments when an NSEP service suffers an outage or is reported as unusable, by:

(a) Ensuring that vendor personnel understand their responsibilities to handle NSEP provisioning requests and to restore NSEP service; and

(b) Providing a 24-hour point-of-contact for receiving provisioning requests for Emergency NSEP services and reports of NSEP service outages or unusability.

(c) Seeking verification from an authorized entity if legitimacy of a priority level assignment or provisioning request for an NSEP service is in doubt. However, processing of Emergency NSEP service requests will not be delayed for verification purposes.

(4) Cooperate with other service vendors involved in provisioning or restoring a portion of an NSEP service by honoring provisioning or restoration priority level assignments, or requests for assistance to provision or restore NSEP services, as detailed in Sections 6(f)(1), (2), and (3) above.

(5) All service vendors, including resale carriers, are required to ensure that service vendors supplying underlying facilities are provided information necessary to implement priority treatment of facilities that support NSEP services.

(6) Preempt, when necessary, existing services to provide an NSEP service as authorized in Section 7 of this appendix.

(7) Assist in ensuring that priority level assignments of NSEP services are accurately identified "end-to-end" by

(a) Seeking verification from an authorized Federal government entity if the legitimacy of the restoration priority level assignment is in doubt;

(b) Providing to subcontractors and/or interconnecting carriers the restoration priority level assigned to a service;

(c) Supplying, to the Executive Office of the President, when acting as a prime contractor to a service user, confirmation information regarding NSEP service completion for that portion of the service they have contracted to supply;

(d) Supplying, to the Executive Office of the President, NSEP service information for the purpose of reconciliation.

(e) Cooperating with the Executive Office of the President during reconciliation.

(f) Periodically initiating reconciliation with their subcontractors and arranging for subsequent subcontractors to cooperate in the reconciliation process.

(8) Receive compensation for costs authorized through tariffs or contracts by

(a) Provisions contained in properly filed state or federal tariffs; or

(b) Provisions of properly negotiated contracts where the carrier is not required to file tariffs.

(9) Provision or restore only the portions of services for which they have agreed to be responsible (i.e., have contracted to supply), unless the President's war emergency powers under Section 706 of the Communications Act are in effect.

(10) Cooperate with the Executive Office of the President during audits.

(11) Comply with any regulations or procedures supplemental to and consistent with this appendix that are issued by the Executive Office of the President and reviewed by the FCC.

(12) Insure that at all times a reasonable number of public switched network services are made available for public use.

(13) Not disclose information concerning NSEP services they provide to those not having a need-to-know or might use the information for competitive advantage.

7. Preemption of Existing Services.

When necessary to provision or restore NSEP services, service vendors may preempt services they provide as specified below. "User" as used in this Section means any user of a telecommunications service, including both NSEP and non-NSEP services. Prior consent by a preempted user is not required.

a. The sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority level "E" or restore NSEP services assigned a restoration priority level from "1" through "5":

(1) Non-NSEP services: If suitable spare services are not available, then, based on the considerations in this appendix and the service vendor's best judgment, non-NSEP services will be preempted. After ensuring a sufficient number of public switched services are available for public use, based on the service vendor's best judgment, such services may be used to satisfy a requirement for provisioning NSEP services.

(2) NSEP services: If no suitable spare or non-NSEP services are available, then existing NSEP services may be preempted to provision or restore NSEP services with higher priority level assignments. When this is necessary, NSEP services will be selected for preemption in the inverse order of priority level assignment.

(3) Service vendors who are preempting services will ensure their best effort to notify the service user of the preempted service and state the reason for and estimated duration of the preemption.

b. Service vendors may, based on their best judgment, determine the sequence in which existing services may be preempted to provision NSEP services assigned a provisioning priority of "1" through "5". Preemption is not subject to the consent of the user whose service will be preempted.

8. Requests for Priority Assignments.

All service users are required to submit requests for priority actions through the Executive Office of the President in the format and following the procedures prescribed by that Office.

9. Assignment, Approval, Use, and Invocation of Priority Levels.

a. *Assignment and Approval of Priority Levels.* Priority level assignments will be based upon the categories and criteria specified in Section 12 of this appendix. A priority level assignment made by the Executive Office of the President will serve as that Office's recommendation to the FCC. Until the President's war emergency powers are invoked, priority level assignments must be approved by the FCC. However, service vendors are ordered to implement any priority level assignments that are pending FCC approval. After invocation of the President's war emergency powers, these requirements may be superseded by other procedures issued by the Executive Office of the President.

b. *Use of Priority Level Assignments.*

(1) All provisioning and restoration priority level assignments for services in the Emergency NSEP category will be included in initial service orders to vendors. Provisioning priority level assignments for Essential NSEP services, however, will not usually be included in initial service orders to vendors. NSEP treatment for Essential NSEP services will be invoked and provisioning priority level assignments will be conveyed to service vendors only if the vendors cannot meet needed service dates through the normal provisioning process.

(2) Any revision or revocation of either provisioning or restoration priority level assignments will also be transmitted to vendors.

(3) Service vendors shall accept priority levels and/or revisions only after assignment by the Executive Office of the President.

NOTE: Service vendors acting as prime contractors will accept assigned NSEP priority levels only when they are accompanied by the Executive Office of the President designated service identification, *i.e.*, TSP Authorization Code. However, service vendors are authorized to accept priority levels and/or revisions from users and contracting activities before assignment by the Executive Office of the President when service vendor, user, and contracting activities are unable to communicate with either the Executive Office of the President or the FCC. Processing of Emergency NSEP service requests will not be delayed for verification purposes.

c. *Invocation of NSEP Treatment.* To invoke NSEP treatment for the priority provisioning of an NSEP telecommunications service, an authorized Federal official either within, or acting on behalf of, the service user's organization must make a written or oral declaration to concerned service vendor(s) and the Executive Office of the President that NSEP treatment is being invoked. Authorized Federal officials include the head or director of a Federal agency, commander of a unified/specified military command, chief of a military service, or commander of a major military command; the delegates of any of the foregoing; or any other officials as specified in supplemental regulations or procedures issued by the Executive Office of the President. The authority to invoke NSEP treatment may be delegated only to a general or flag officer of a military service, civilian employee of equivalent grade (e.g., Senior Executive Service member), Federal Coordinating Officer or Federal Emergency Communications Coordinator/Manager, or any other such officials specified in supplemental regulations or procedures issued by the Executive Office of the President. Delegates must be designated as such in writing, and written or oral invocations must be accomplished, in accordance with supplemental regulations or procedures issued by the Executive Office of the President.

10. Resubmission of Circuits Presently Assigned Restoration Priorities.

All circuits assigned restoration priorities must be reviewed for eligibility for initial restoration priority level assignment under the provisions of this appendix. Circuits currently assigned restoration priorities, and for which restoration priority level assignments are requested under Section 8 of this appendix, will be resubmitted to the Executive Office of the President. To resubmit such circuits, service users will comply with applicable provisions of Section 6(d) of this appendix.

11. Appeal.

Service users or sponsoring Federal organizations may appeal any priority level assignment, denial, revision, revocation, approval, or disapproval to the Executive Office of the President within 30 days of notification to the service user. The appellant must use the form or format required by the Executive Office of the President and must serve the FCC with a copy of its appeal. The Executive Office of the President will act on the appeal within 90 days of receipt. Service users and sponsoring Federal organizations may only then appeal directly to the FCC. Such FCC appeal must be filed within 30 days of notification of the Executive Office of the President's decision on appeal. Additionally, the Executive Office of the President may appeal any FCC revisions, approvals, or disapprovals to the FCC. All appeals to the FCC must be submitted using the form or format required. The party filing its appeal with the FCC must include factual details supporting its claim and must serve a copy on the Executive Office of the President and any other party directly involved. Such party may file a response within 20 days, and replies may be filed within 10 days thereafter. The Commission will not issue public notices of such submissions. The Commission will provide notice of its decision to the parties of record. Any appeals to the Executive Office of the President that include a claim of new information that has not been presented before for consideration may be submitted at any time.

12. NSEP TSP System Categories, Criteria, and Priority Levels.

a. *General.* NSEP TSP System categories and criteria, and permissible priority level assignments, are defined and explained below.

(1) The Essential NSEP category has four subcategories: National Security Leadership; National Security Posture and U.S. Population Attack Warning; Public Health, Safety, and Maintenance of Law and Order; and Public Welfare and Maintenance of National Economic Posture. Each subcategory has its own criteria. Criteria are also shown for the Emergency NSEP category, which has no subcategories.

(2) Priority levels of "1," "2," "3," "4," and "5" may be assigned for provisioning and/or restoration of Essential NSEP telecommunication services. However, for Emergency NSEP telecommunications services, a priority level "E" is assigned for provisioning. A restoration priority level from "1" through "5" may be assigned if an Emergency NSEP service also qualifies for such a restoration priority level under the Essential NSEP category.

(3) The NSEP TSP System allows the assignment of priority levels to any NSEP telecommunications service across three time periods, or stress conditions: Peacetime/Crisis/Mobilization, Attack/War, and Post-Attack/Recovery. Priority levels will normally be assigned only for the first time period. These assigned priority levels will apply through the onset of any attack, but it is expected that they would later be revised by surviving authorized telecommunication resource managers within the Executive Office of the President based upon specific facts and circumstances arising during the Attack/War and Post-Attack/Recovery time periods.

(4) Service users may, for their own internal use, assign subpriorities to their services assigned priority levels. Receipt of and response to any such subpriorities is optional for service vendors.

(5) The following paragraphs provide a detailed explanation of the categories, subcategories, criteria, and priority level assignments, beginning with the Emergency NSEP category.

b. *Emergency NSEP*. Telecommunications services in the Emergency NSEP category are those new services so critical as to be required to be provisioned at the earliest possible time, without regard to the costs of obtaining them.

(1) *Criteria*. To qualify under the Emergency NSEP category, the service must meet criteria directly supporting or resulting from at least one of the following NSEP functions:

(a) Federal government activity responding to a Presidentially declared disaster or emergency as defined in the Disaster Relief Act (42 U.S.C. § 5122).

(b) State or local government activity responding to a Presidentially declared disaster or emergency.

(c) Response to a state of crisis declared by the National Command Authorities (*e.g.*, exercise of Presidential war emergency powers under Section 706 of the Communications Act.)

(d) Efforts to protect endangered U.S. personnel or property.

(e) Response to an enemy or terrorist action, civil disturbance, natural disaster, or any other unpredictable occurrence that has damaged facilities whose uninterrupted operation is critical to NSEP or the management of other ongoing crises.

(f) Certification by the head or director of a Federal agency, commander of a unified/specified command, chief of a military service, or commander of a major military command, that the telecommunications service is so critical to protection of life and property or to NSEP that it must be provided immediately.

(g) A request from an official authorized pursuant to the Foreign Intelligence Surveillance Act (50 U.S.C. § 1801 *et seq.* and 18 U.S.C. §§ 2511, 2518, 2519).

(2) *Priority Level Assignment.*

(a) Services qualifying under the Emergency NSEP category are assigned priority level "E" for provisioning.

(b) After 30 days, assignments of provisioning priority level "E" for Emergency NSEP services are automatically revoked unless extended for another 30-day period. A notice of any such revocation will be sent to service vendors.

(c) For restoration, Emergency NSEP services may be assigned priority levels under the provisions applicable to Essential NSEP services (*see* Section 12(c)). Emergency NSEP services not otherwise qualifying for restoration priority level assignment as Essential NSEP may be assigned a restoration priority level "5" for a 30-day period. Such 30-day restoration priority level assignments will be revoked automatically unless extended for another 30-day period. A notice of any such revocation will be sent to service vendors.

c. *Essential NSEP*. Telecommunication services in the Essential NSEP category are those required to be provisioned by due dates specified by service users, or restored promptly, normally without regard to associated overtime or expediting costs. They may be assigned priority levels of "1", "2," "3," "4," or "5" for both provisioning and restoration, depending upon the nature and urgency of the supported function, the impact of lack of service or of service interruption upon the supported function, and, for priority access to public switched services, the user's level of responsibility. Priority level assignments will be valid for no more than three years unless revalidated. To be categorized as Essential NSEP, a telecommunications service must qualify under one of the four following subcategories: National Security Leadership; National Security Posture and U.S. Population Attack Warning; Public Health, Safety and Maintenance of Law and Order; or Public Welfare and Maintenance of National Economic Posture. (Note: Under emergency circumstances, Essential NSEP telecommunication services may be recategorized as Emergency NSEP and assigned a priority level "E" for provisioning.)

(1) *National Security Leadership*. This subcategory will be strictly limited to only those telecommunication services essential to national survival if nuclear attack threatens or occurs, and critical orderwire and

control services necessary to ensure the rapid and efficient provisioning or restoration of other NSEP telecommunication services. Services in this subcategory are those for which a service interruption of even few minutes would have serious adverse impact upon the supported NSEP function.

(a) *Criteria*. To qualify under this subcategory, a service must be at least one of the following:

(i) Critical orderwire, or control service, supporting other NSEP functions.

(ii) Presidential communications service critical to continuity of government and national leadership during crisis situations.

(iii) National Command Authority communications service for military command and control critical to national survival.

(iv) Intelligence communications service critical to warning of potentially catastrophic attack.

(v) Communications service supporting the conduct of diplomatic negotiations critical to arresting or limiting hostilities.

(b) *Priority Level Assignment*. Services under this subcategory will normally be assigned priority level "1" for provisioning and restoration during the Peace/Crisis/Mobilization time period.

(2) *National Security Posture and U. S. Population Attack Warning*. This subcategory covers those minimum additional optimum defense, diplomatic, or continuity-of-government postures before, during, and after crises situations. Such situations are those ranging from national emergencies to international crises, including nuclear attack. Services in this subcategory are those for which a service interruption ranging from a few minutes to one day would have serious adverse impact upon the supported NSEP function.

(a) *Criteria*. To qualify under this subcategory, a service must support at least one of the following NSEP functions:

(i) Threat assessment and attack warning.

(ii) Conduct of diplomacy.

(iii) Collection, processing, and dissemination of intelligence.

(iv) Command and control of military forces.

(v) Military mobilization.

(vi) Continuity of Federal government before, during, and after crises situations.

(vii) Continuity of state and local government functions supporting the Federal government during and after national emergencies.

(viii) Recovery of critical national functions after crises situations.

(ix) National space operations.

(b) *Priority Level Assignment*. Services under this subcategory will normally be assigned priority levels "2," "3," "4," or "5" for provisioning and restoration during Peacetime/Crisis/Mobilization.

(3) *Public Health, Safety, and Maintenance of Law and Order*. This subcategory covers the minimum number of telecommunication services necessary for giving civil alert to the U.S. population and maintaining law and order and the health and safety of the U.S. population in times of any national, regional, or serious local emergency. These services are those for which a service interruption ranging from a few minutes to one day would have serious adverse impact upon the supported NSEP functions.

(a) *Criteria*. To qualify under this subcategory, a service must support at least one of the following NSEP functions:

(i) Population warning (other than attack warning).

(ii) Law enforcement.

(iii) Continuity of critical state and local government functions (other than support of the Federal government during and after national emergencies).

(iv) Hospitals and distributions of medical supplies.

(v) Critical logistic functions and public utility services.

(vi) Civil air traffic control.

(vii) Military assistance to civil authorities.

(viii) Defense and protection of critical industrial facilities.

(ix) Critical weather services.

(x) Transportation to accomplish the foregoing NSEP functions.

(b) *Priority Level Assignment*. Service under this subcategory will normally be assigned priority levels "3," "4," or "5" for provisioning and restoration during Peacetime/Crisis/Mobilization.

(4) *Public Welfare and Maintenance of National Economic Posture*. This subcategory covers the minimum number of telecommunications services necessary for maintaining the public welfare and national economic posture during any national or regional emergency. These services are those for which a service interruption ranging from few minutes to one day would have serious adverse impact upon the supported NSEP function.

(a) *Criteria*. To qualify under this subcategory, a service must support at least one of the following NSEP functions:

(i) Distribution of food and other essential supplies.

(ii) Maintenance of national monetary, credit, and financial systems.

(iii) Maintenance of price, wage, rent, and salary stabilization, and consumer rationing programs.

(iv) Control of production and distribution of strategic materials and energy supplies.

(v) Prevention and control of environmental hazards or damage.

(vi) Transportation to accomplish the foregoing NSEP functions.

(b) *Priority Level Assignment.* Services under this subcategory will normally be assigned priority levels "4" or "5" for provisioning and restoration during Peacetime/Crisis/Mobilization.

d. *Limitations.* Priority levels will be assigned only to the minimum number of telecommunication services required to support an NSEP function. Priority levels will not normally be assigned to backup services on a continuing basis, absent additional justification, *e.g.*, a service user specifies a requirement for physically diverse routing or contracts for additional continuity-of-service features. The Executive Office of the President may also establish limitations upon the relative numbers of services which may be assigned any restoration priority level. These limitations will not take precedence over laws or executive orders. Such limitations shall not be exceeded absent waiver by the Executive Office of the President.

e. *Non - NSEP services.* Telecommunication services in the non-NSEP category will be those which do not meet the criteria for either Emergency NSEP or Essential NSEP.

FOOTNOTES

[1] Executive Order No. 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions," April 3, 1984 (49 Fed. Reg. 13471 (1984)), established the NCS. Section 1(e) of Executive Order No. 12472 designates the Secretary of Defense as Executive Agent for the NCS. By direction of the Executive Office of the President (EOP), the NCS member organizations are: Department of Agriculture, Central Intelligence Agency, Department of Commerce, Department of Defense, Department of Energy, Federal Emergency Management Agency, General Services Administration, Department of the Interior, Department of Justice, National Aeronautics and Space Administration, National Security Agency, National Telecommunications & Information Administration, Organization of the Joint Chiefs of Staff, Department of State, Department of Transportation, Department of Treasury, U.S. Information Agency, and the Veterans Administration. The Nuclear Regulatory Commission has been invited by the EOP and has elected to serve as an NCS member organization. The FCC, Federal Reserve System, and United States Postal Service also participate in the activities of the NCS.

[2] In its comments to the NPRM, NCS filed a revised proposal in response to some of the concerns discussed in the NPRM. In this decision references are to the original proposal that constituted the appendix to the NPRM. References to NCS' revised proposal are indicated in brackets where appropriate.

[3] Comments were filed by Aeronautical Radio, Inc. (Arinc), Alarm Industry Communications Committee (AICC), American Telephone and Telegraph Company (AT&T), Ameritech Operating Companies (Ameritech), Association of American Railroads (AAR), Bell Atlantic Telephone Companies (Bell Atlantic), Bell Communications Research, Inc. (Bellcore), BellSouth Corporation (BellSouth), Cellular Telecommunications Industry Association (CTIA), Centel Corporation (Centel), Federal Executive Agencies (DoD or NCS), GTE Service Corporation (GTE), Nickolaus E. Leggett (Leggett), McCaw Cellular Communications, Inc. (McCaw), MCI Telecommunications Corporation (MCI), The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (collectively, US West), National Association of Regulatory Utility Commissioners (NARUC), National Telephone Cooperative Association (NTCA), NYNEX Telephone Companies (NYNEX), Pacific Bell and Nevada Bell (collectively, Pacific Bell), Southwestern Bell Telephone Company (Southwestern Bell), Telocator Network of America (Telocator), Teltec Saving Communications Co. (Teltec), United States Telephone Association (USTA) and Utilities Telecommunications Council (UTC). Reply comments were filed by AT&T, Bellcore, BellSouth, CTIA, Cincinnati Bell Telephone (CBT), GTE, McCaw, MCI, NCS, Pacific Bell, Southwestern Bell, Telocator, USTA and US West.

[4] A Priority System for the Use and Restoration of Leased Intercity Private Line Services, 6 F.C.C. 2d 344 (1967). These rules have been amended on three occasions. *See* 22 F.C.C. 2d 159 (1970); 77 F.C.C. 2d 114 (1980); 81 F.C.C. 2d 441 (1980). *See also* Declaratory Ruling, 104 FCC 2d 945 (1986), *recon.*, FCC 86-592 (Jan. 8, 1987).

[5] Section 706, 47 U.S.C. § 706, provides, in part, that during war the President is authorized "to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this Act." The Executive Branch has promulgated rules parallel to the Commission's to accommodate the transfer of regulatory authority over the RP System to the President in the event Section 706 is invoked.

[6] Under the current rules, federal and foreign government users' requests are submitted to the NCS; state and local government and private industry requests are submitted directly to the FCC.

[7] As used in this proceeding, the word "provisioning" refers to the initiation of a new service or line as opposed to the restoration of an existing service or line.

[8] NCS noted that as technology is changing it is becoming infeasible to physically identify specific circuits in a carrier's office and associate them with specific restoration priorities. The TSP System is designed to alleviate this problem by assigning priorities to services, and even users, when appropriate.

[9] The petition stated that in September of 1984, in light of these problems and the vast changes that have occurred in the telecommunications industry over the last five years, the Manager of NCS directed action to update and modernize the RP System. NCS asked each industry entity represented on the National Security Telecommunications Advisory Committee (NSTAC) to provide advice regarding the matters that needed to be addressed in provisioning and restoring NSEP services. The NSTAC Industry Executive Subcommittee (IES) subsequently established a TSP Task Force to assist the government in the development of the TSP System. NCS, in conjunction with the TSP Task Force, began work on drafting TSP System baseline requirements. The requirements were distributed to the telecommunications industry and the NCS Council of Representatives for review and comment and were approved by NSTAC's IES and the NCS Committee of Principals in June 1985. Next, a TSP System Concept, which was to describe the TSP System in sufficient detail to permit its subsequent design and implementation, was drafted and approved by the NCS Committee of Principals and NSTAC in the spring of 1986. Subsequently, work was begun on the petition for Rule Making together with detailed procedures for implementingand operating the TSP System.

[10] NARUC v. FCC, 746 F.2d 1492, 1498-99 (D.C. Cir. 1984); California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (NCUC I); North Carolina Util. Comm'n v. FCC 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (NCUC II). *See also* C&P Tel. Co. of Maryland, 2 FCC Rcd 3528 (1987).

[11] In the NPRM, at para. 34, we discussed the argument raised by Bell Atlantic that the proposed rules would bar the restoration of any facility not a part of the TSP system, even if it were an important local service such as 911, prior to the restoration of all TSP services. NCS noted that Section 5 of the rules bars only conflicting priority systems. In response to the NRPM, Centel suggests that 911 and other vital local services be assigned priority status if they are not otherwise part of TSP, and NTCA recommends that 911 service be given restoration priority status. We believe that the policy set forth herein, in conjunction with the language and intent of Section 5, offers adequate guidance on this matter.

[12] In a large scale failure it is possible that portions of the PSN will be restored before some NSEP priority private line services. We believe this kind of occurrence may be occasionally unavoidable and we would not rule now that such a result is *per se* not compliant with the TSP rules. *See* discussion, *infra*, on preemption.

[13] The term "sufficient number" in Section [7(a)(1)] is open-ended and may in some cases result in near normal PSN service or, in other cases, very few available PSN lines. At this time we will rely on the good faith of carriers to provide, to the extent possible, a reasonably sufficient array of PSN circuits. The change from "will remain" to "are" in Section [7(a)(1)] assures that consideration is given to PSN circuits in the event all circuits in an area are down. (Of course, NSEP priorities will take precedence).

[14] *See* existing Part 64 rules and Declaratory Ruling, 104 F.C.C. 2d 945 (1986).

[15] In this order we will delegate authority to the Chief, Common Carrier Bureau to decide the matter of disposition of the filing(s) to the Commission and to resolve, in the first instance, all related substantive and procedural issues. *See* para. 133, *infra*. *See also* note 41, *infra*.

[16] NCS cites Burdick v. Southwestern Bell Telephone Company, 9 Kan. App. 2d 182, 675 P.2d 922 (1984), reaching an opposite result on intent.

[17] In Declaratory Ruling, *supra*, at para. 23, we stated that

> The procedures appear reasonable and it is important for national security reasons that carriers know that actions they take to meet NSEP requirements should not later be subject to potential liability. Accordingly, we find that carrier actions in response to requests made in accordance with the Procedures Manual are prima facie lawful. Any party challenging discriminatory treatment occasioned by a request made pursuant to the Manual would have a very heavy burden to demonstrate its unreasonableness.

[18] While consent will not be mandated, we would expect notification as a matter of normal business practice, where practicable. *See* Section [7(a)(3)].

[19] Our alternative language at para. 29 of the NPRM was:

> (7) Receive compensation for costs through
>
> (a) Provisions contained in properly filed tariffs; or
>
> (b) Provisions of properly negotiated contracts where the carrier is not required to file tariffs.

[20] Moreover, in each case of TSP invocation a different set of general ratepayers may benefit and in many cases persons or entitites that are not general ratepayers may benefit, such as private line service subscribers or even non-telephone subscribers.

[21] Section [3(t)] reads: *Service User* refers to any individual or organization (including a service vendor) supported by a telecommunications service for which a priority level has been requested or assigned pursuant to Section 8 or 9 of this appendix.

[22] *See* Section 1(b) of TSP rules. We note, as did UTC in its comments, that Sections 3(k), 3(t) and 4(c) refer to services which are not strictly common carrier in nature and which, therefore, are not subject to Title II of the Act or the TSP rules. However, Section [4(a)(2), amended] provides that the scope of TSP includes

> Services which are provided by government and/or non-common carriers and [which] are interconnected to common carrier services assigned a priority level pursuant to section 9 of this appendix.

The extent to which non-common carrier services, systems or facilities are subject to or protected by pre-706 TSP System rules is limited by the degree to which the common carrier vendor uses those services, systems or facilities to provide its common carrier services, systems and facilities. This does not preclude NCS from using an alternative interpretation in discussions or negotiations with parties not subject to Title II of the Act to establish analogous provisioning or restoration priorities. *See, e.g.*, AAR Comments at pp. 3 and 6. This also resolves the question raised by AT&T concerning the Commission's authority over equipment vendors who sell equipment to others for direct connection to the network.

[23] Arinc also urges that the Commission not permit NCS to downgrade priorities already approved under RP. We reject this request. A critical reason for NCS proposing TSP is the skewed distribution of RP priority assignments. With TSP should come a review of all assignments, some of which may be upgraded or downgraded.

[24] Since NCS recommendations are considered interim assignments pending FCC review, and assignees (users or sponsoring agencies) are authorized to proceed on the basis of receipt of the interim assignments, FCC review time is not included in the 30 day limit. In other words, the 30 day requirement is solely applicable to NCS' response to priority requests.

[25] Upon sufficient showing, the 30 day period can be waived.

[26] In order to expedite resolution of disputes and other matters involving TSP that are submitted to the Commission, we will delegate all necessary authority to the Chief, Common Carrier Bureau to discharge, among other matters, the Commission's responsibilities under Section 6.

[27] The FCC Form 915 has been eliminated. Any new form will be developed in conjunction with NCS and the Office of Management and Budget.

[28] For example, if a service user files an appeal it must provide a copy to the service provider.

[29] Control services and orderwires as used in TSP refer to internal means used by carriers for network management purposes. Similar terms, not related to matters associated with this proceeding, have been used with regard to control channels for specialized data services such as ISDN.

[30] Resellers may secure special circuits, such as control or orderwire services, in order to manage the services and facilities they offer users. They are not responsible for the integrity of the underlying physical plant and so would not benefit from TSP exemption for their leased internal management facilities or services. Their leased orderwire and control services could qualify,

however, for priority treatment under the TSP System rules. Accordingly, the last sentence of Section 4(b) will be adopted as proposed.

[31] McCaw's revised Section 8 would read:

> Certain telecommunications service vendors do not own any or all of the transmission facilities used to provide telecommunications services. They rely instead, in whole or in part, on facilities leased from other telecommunications vendors. These resale or interconnecting carriers may provide services that qualify for priority level assignment. In order for the priority level assignment to have practical value, it must also apply to the service leased by the resale or interconnecting carrier from another telecommunications service vendor, such that the highest priority level assigned to any service using the underlying facility will determine that facility's priority level assignment. Resale and interconnecting carriers must also ensure that telecommunication service vendors supplying underlying facilities are provided information necessary to implement any priority levels assigned to resale or interconnecting carrier services.

[32] While TSP focuses on services, it is facilities that are always actually provisioned or restored.

[33] "Non-disclosure" as a standard business practice would serve as a defense against an assertion of abuse.

[34] This information includes identification, priority, contracting activity and contract identification data which must be received by EOP directly from the prime service vendor.

[35] It has been suggested that charges incurred as a result of reconciliation and audits be borne by NCS as the cost causative user. *See* discussion, *supra*, concerning costs.

[36] It has been informally suggested that a different term be used, such as investigation, reconciliation procedure, problem review, etc. In view of our discussion herein, we believe the term audit is appropriate.

[37] The definition of "revalidation" in Section 3(o)[3(p)] in conjunction with the clarification of "audit" should alleviate Ameritech's concern regarding improper changing of circuit designations through the recordkeeping process.

[38] NCS' changes in Sections 6(c)(3), 6(d)(10) and 6(f)(6)(e) [6(f)(7)(e)] as well as its addition of Section [6(f)(7)(f)] to require vendors to track their contractors' records, respond to suggestions and concerns expressed by AT&T, GTE and McCaw regarding reconciliation responsibilities. Further in response to McCaw, we interpret Section [6(f)(7)(f)] to require contractors, in turn, to be primarily responsible for their subcontractors' reconciliation activities. This institutionalized burden flow-through represents the most expedient means of assuring that reconciliation is conducted correctly by each succeeding subcontractor. We will modify the language of Section [6(f)(7)(f)] accordingly.

[39] NCS has indicated that it will maintain its MIS database of priority level assignments. *See* Section 6(b)(2)(c). Hence, the concern expressed by Pacific Bell to assure a source of information is moot. We are also satisfied that NCS' statement that in most cases verification will be obtained from EOP is responsive to Pacific Bell's concern regarding the identity of "authorized entity" in Sections 6(f)(3)(c) and 6(f)(6)(a) [6(f)(7)(a)].

[40] Southwestern Bell's suggestion to include a definition of "reconciliation" has been adopted by NCS. *See* Section 3[n].

[41] There are several references in the pleadings to the issuance of procedural guidelines by NCS. The guidelines are called, variously, vendor operating procedures, operational procedures, operational guidelines, operations manual, procedural guidelines, etc. All of these refer to the procedural guidelines that are currently under preparation by NCS for government and vendors. Our analysis applies equally to both, and for purposes of this discussion there is no decisional significance to any of the terms used for NCS' procedural guidelines, since, in whole or part, they will appear before us for review. Proposed Directive 3-1 is subsumed in this term as well.

[42] NCS apparently based its position in part on its predicate argument that the Commission should delegate EOP authority to develop rules that implement TSP. *See* paras. 34-35, *supra*.

[43] The difference between the adoption date and Federal Register date will likely be only a matter of weeks. The Commission's decision is effective 30 days following the Federal Register date. (The Federal Register date also constitutes the official release date. If there is no Federal Register publication, the official release date is the day the order is released to the public at the Commission's main offices, 1919 M Street, N.W., Washington, D.C.). We also note that RP assignments may be issued until the IOC date, in order to preserve the availability of a priority procedure until TSP is initiated. This is codified in Section 2 of the TSP rules. With effectuation of the TSP rules (IOC date), however, the RP rules and the precedence rules will be deleted from the Code of Federal Regulations. Nevertheless, the extent to which RP remains viable, *i.e.*, until the FOC date, will be by reference through Section 2 of the rules.

[44] Moreover, application of RP to cellular services would require a Rule Making proceeding, resolution of which would probably not occur prior to TSP IOC. The TSP NPRM did not contemplate any interim changes to the existing RP rules.

[45] Of course, the common carrier component may be subject to TSP if the common carrier provider of that component complies with the TSP procedures.

[46] Private system owners may be subject to antitrust action if they provide priority treatment to certain users. Collateral compliance by private users with TSP standards and procedures may not necessarily provide them with a defense to antitrust allegations.

[47] Section 0.314(g) of the Commission's rules delegates authority to the Engineer in Charge (EIC) at each installation to act on and make determinations on behalf of the Commission regarding requests for reassignment of restoration priority levels and assignment of new restoration priorities concerning the restoration in emergencies of common carrier-provided intercity private line service pursuant to Appendix A of Part 64 of the Commission's rules when, for any reason, the Commission's RP processing staff cannot be contacted. This provision was predicated on the RP System, which involved assignment of priorities by either the Commission or NCS. The TSP System, however, essentially reserves initial assignment (or reassignment) of all priorities to NCS. A general delegation to the EIC to issue priorities under TSP potentially could conflict with the process established under TSP. On the other hand, there may be exceptional circumstances under which an EIC, on-site and with authority to alter or grant priorities, would serve the purposes of TSP and the public interest. Those circumstances should be limited to cases where, in the judgment of the EIC, after reasonable effort neither NCS nor the Commission can be contacted and where physical conditions or logistics warrant immediate action. In any such case, the NCS and the Commission must be notified as soon as possible by the EIC, and the carrier involved must expeditiously seek priority in accordance with normal TSP procedures. We will amend Section 0.314(g) accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-161

In the Matter of

Amendment of Part 22 of the
Commission's Rules to Revise
Certain Filing Procedures for
Mobile Services Division
Applications and to eliminate
Form 430

REPORT AND ORDER

Adopted: October 26, 1988; Released: November 16, 1988

By the Commission:

INTRODUCTION AND BACKGROUND

1. On April 15, 1988, we released a Notice of Proposed Rule Making (Notice)[1] proposing to revise certain sections of Part 22 of the rules (Public Mobile Radio Services). The Notice proposed revising the number and form of copies of Mobile Services Division (MSD) applications to be filed with the Commission and proposed to eliminate the requirement to file FCC Form 430.[2] We have received 16 comments and four reply comments filed by potential applicants, engineering consultants, law firms, telecommunication corporations, and trade associations. [3] (*See* Appendix A for listing of commenters and abbreviations used herein.) We have carefully considered each response received to the Notice, and all points of view have been taken into account in this Order.

2. The Notice proposed amending Section 22.6(d) of the rules to require that all applications, amendments, correspondence, exhibits, and attachments be filed on microfiche. The Notice proposed that non-cellular applicants and non-initial cellular applicants[4] be required to submit the original application as well as three[5] microfiche copies. The Notice also proposed that initial cellular applicants would initially submit only two microfiche copies. Only the winning cellular applicants would be required to file an original paper copy and a duplicate paper copy. The Notice proposed amending Section 22.913(c) of the rules, which describes the requirements for filing microfiche copies for cellular applications, to remove the requirement for paper copies, except for those applicants winning the lottery. The Notice proposed that Section 22.918(b) of the rules, which describes the requirements and deadlines for amending initial cellular applications, would be amended to require that amendments be filed on microfiche and to include the filing of paper copies, within fourteen days of the date of public notice. The Notice further proposed that Sections 22.913(b)(1), (2) and (3) of the rules, which describes the requirements for the filing of paper copies and certifications for cellular applications, be repealed. The Notice also proposed that Section 22.11(a) of the rules be repealed.

3. We proposed this Rule Making as a way of providing service to the public with greater speed and efficiency. Because of the increasing volume of applications being filed and currently stored in the MSD, we felt compelled to consider measures that would give us the greatest administrative flexibility in meeting the needs of the public. To meet these needs, it is imperative that we devise a method that would avoid the need for additional reference areas, reduce the necessity to continually add personnel to cope with the volume of work, reduce the volume of the applications currently stored in the MSD station files and save space. As a result, the files will be easier to retrieve for use by the public and the staff.

COMMENTS

4. The commenters generally oppose the proposal to file applications on microfiche because they argue that it would be unduly burdensome and costly, especially on applicants in small markets and rural areas. Centel and B&F, while supporting the proposal for initial cellular applications, object to the requirement for non-initial cellular applications and non-cellular applications. They, however, both agree that the microfiche requirement for cellular applicants will conserve space and personnel resources. GTE, while supporting the requirement for initial FCC Form 401 applications, opposes the proposal that other filings be submitted on microfiche. Pacific Companies request clarification on whether the microfiche requirement for correspondence applies to comments, petitions to deny and other pleadings with respect to applications. Romulus suggests, that if pleadings are to be retained in the station files they should be microfiched, but that an exception should be made for simple requests for extensions of time.

5. The fact that microfiche services are not available in many areas is a concern of several commenters. Rule, a rural area radio common carrier, notes that it cannot locate any microfiche services in the state of Wyoming. Several commenters argue that it would be unfair to require small businesses to travel or mail applications to a large city to have their applications microfiched in order to file. Rule suggests that rural applicants in areas without access to microfiche be exempt from the microfiche requirement. Even where microfiche services are available, Vega notes that many are not equipped to process small jobs efficiently at a reasonable cost.

6. Many commenters express concern about the cost associated with the proposed microfiche requirement. Pacific Companies, B&M. B&F, FWLC, Pactel, P&C, SBC, Telocator, and Vega estimate that it will cost between 10,000 and50,000 for an applicant or firm to have the facilities to establish its own microfiche services. Many commenters maintain that in-house microfiche services will incur additional on-going expenses for maintenance, supplies, and personnel. Use of microfiche, they note, is burdensome because it would also require specially trained personnel to run the machines, in addition to personnel to review and keep track of each filing to be microfiched. With respect to commercial microfiche services, several commenters note that while some charge by the page,

others have a minimum cost of25-50 per order. While multiple filings can spread the cost, they note that for an occasional filer, the cost can be considerable.

7. In addition, some commenters are concerned that the additional time involved in preparing applications will delay the start of service after construction of a station. They estimate that commercial services require several days to a week to prepare microfiche copies. The commenters argue, therefore, that the proposal will unnecessarily delay service to the public given the additional time necessary to file FCC Form 489 (Notification of Status of Facilities under Part 22) after construction as well as the time lost by subjecting applicants to additional risks of dismissal if the original and microfiche do not match exactly.

8. The Notice stated that the Commission would consider exempting submissions of two pages or less from the microfiche requirement. Bell South, Centel, and SBC suggest that this be expanded to five pages. Rule points out, however, that because most small businesses usually file 12 page applications, they would rarely meet the exemption and, therefore, suggests that small businesses be exempt from the microfiche requirement altogether. B&F argues that even if the page limit for exemptions were increased by a few pages, the overall expense of microfiche would still be prohibitive.

9. SBC argues that our proposal is contrary to the Paperwork Reduction Act of 1980[6] and the Regulatory Flexibility Act,[7] because the impact will be costly, burdensome, and not equally distributed. Further, they express concern that the microfiche proposal is not consistent with the Commission policy expressed in the prior revision of Part 22[8] to reduce bookkeeping and ease the burden on small entities, as reflected in the current Section 22.6 of the rules. SBC refers to a Government Accounting Office (GAO) Report[9] on the FCC's Public Reference Rooms that noted that the public had problems locating files and expressed concern with the security of Commission records. SBC states that microfiching has not improved the problems in the reference room. Telocator and SBC further note that the proposal imposes a burden on mobile common carriers that is not imposed on other Commission applicants, such as, mass media, private radio, and other common carriers, and especially those in direct competition with Part 22 licensees, *i.e.*, Specialized Mobile Radio Service and Private Carrier Paging Systems.

10. Several commenters note the discrepencies between the microfiche specifications proposed in the Notice and the types of microfiche available from the microfiche companies. They note that a survey of microfiche companies indicates that small companies do not have equipment to produce a true 24X reduction and would have to order film specially to meet archival quality, clear or black. In addition, they state that "archival quality" is not clearly defined in the industry, and most microfiche companies use "diazo" not "silver halide" as proposed in the Notice. Pacific Companies note that our use of the term "jacketed microfiche" in the Notice could apply to different types of processing, regular diazo and archival quality.

11. Some commenters state that, while they support our objective to reduce space and the need for additional personnel, they do not believe that requiring applicants to file microfiche copies will meet that goal. They state that non-initial cellular and non-cellular applicants will still have to submit an original application and that the Commission will need more space for additional microfiche viewing and copying equipment. Several commenters think that there will be more delay and confusion as researchers wait to obtain and view microfiche applications. They view the proposal as not succeeding in reducing the necessity to increase personnel.

12. Several commenters present alternatives to our proposal for solving the problem of long term storage. They suggest that applicants be given the option of submitting an original paper application and replace it with a microfiche copy in a specified time period. This, they state, will address the concern of long term space storage. However, the commenters disagree on the time that should be allowed to file the microfiche copy with suggestions ranging from 5 to 30 days. They also want the filing of the paper original to toll the filing deadlines. This option, commenters suggest, will eliminate the need to constantly request an extension of time since many filings have short deadlines. B&F, however, opposes the option of filing microfiche copies later, stating that this would not affect the cost factor or the Commission's need for space.

13. With respect to the proposal to eliminate the requirement for Part 22 licensees to file FCC Form 430 annually, virtually all commenters who addressed the proposal were in favor of it.[10] A few commenters propose the elimination of other parts of the rules that require the filing of FCC Form 430. Offshore objects to this proposal, because it considers the FCC Form 430 to be an effective way to save time and labor, since it does not have to repeat the officers and directors of its subsidiaries each time it files an application. P&C, agreeing with the proposal, states that line 18 of FCC Form 490[11] refers to FCC Form 430 and, therefore, should be amended.

DISCUSSION

14. We have carefully considered and analyzed the comments received in response to the Notice and conclude that it is in the public interest to adopt our proposal with the modifications described below. These modifications were suggested by many commenters. We considered the concerns contained in these comments and weighed them against our independent analysis to draft a solution that most effectively and efficiently serves the public. We believe that adoption of the proposals in the Notice will enable us to serve the public in a more efficient, secure, and expeditious manner and result in more efficient use of Commission space.

15. As proposed in the Notice, we require that all non-cellular applications and non-initial cellular applications,[12] amendments, correspondence,[13] and forms including attachments and exhibits thereto be submitted on microfiche as provided in this Order. Non-initial cellular applicants and non-cellular applicants will be required to submit the original application as well as three microfiche copies. Submitting applications on microfiche is not a new procedure for many applicants. In 1985, we required that cellular applicants in the top-90 and above markets file initial cellular applications on microfiche.[14] Since the filing of initial cellular applications for the metropolitan service area markets has been completed, there is no longer a need to amend the initial cellular rules as proposed. Moreover, we have begun accepting initial applications for the rural cellular markets. The rules pertaining to the requirements for filing initial rural cellular applications have been addressed in the rural cellular orders.[15]

16. The use of microfiche in the MSD does not establish a stand alone, information system that would be incompatible with other Commission information systems and data bases. The microfiche is simply a substitute for paper filings, a substitute that is both cost-effective and well suited for the MSD type of processing environment. Further, the use of microfiche as a filing, storage, and retrieval medium in this particular manner does not represent a change in direction in the Commission's overall automation goals for license processing nor would it present obstacles or limit Commission flexibility regarding future plans for the use of optical disk technology in other areas. It is simply an improved method of dealing with voluminous paper filings which has proven to be readily adaptable to the MSD operations.

17. We believe that there are several benefits to the public from a requirement that applicants submit future MSD filings on microfiche. These benefits are evidenced, in part, from other recent decisions of ours to reduce MSD documentation to microfiche format. For example, our decision in 1985 to require that cellular applications in the top-90 and above markets file initial cellular applications on microfiche resulted in our ability to approve nationwide applications very quickly in spite of the enormous volume of cellular applications.[16] This, in turn, facilitated the implementation and development of a new technology and industry that the public was anxious to have. A further illustrative example of the benefits of microfiching is our project, begun in October 1987, to have all the current non-cellular files in the MSD microfiched; since that time, all of the non-cellular files have been converted. We have received a number of oral and written compliments from the public on the improvements in the MSD reference room as a result of having the files microfiched. These public comments indicated that files were easier to access and that as a result, the reference room staff could provide service to the public in the reference room faster and more efficiently. The microfiche project has also enhanced our ability to maintain the integrity and security of our MSD files because it is easier for staff to count the microfiche sheets than paper filings. In addition, there is a master set of microfiche, locked away and not for public use, in case any files are found missing.[17] We believe that similar benefits will result from a requirement that all future MSD filings be submitted on microfiche.

18. While we recognize that requiring microfiche copies of applications may increase the complexity and expense of preparing and filing applications, we do not believe this burden to be excessive and believe it to be a small part of the overall cost of doing business and filing applications. This requirement, in comparison with the overall cost of construction and operating a business, is not burdensome. We have surveyed several microfiche companies concerning the quality and cost for microfiche services. Although these companies generally have a minimum price of25-100, they state that this price can be modified when they will be assured of getting a large volume of work over a period of time from an applicant. Because our new filing requirement will increase the volume of work for microfiche companies, they can be expected to modify their prices accordingly. Unless an applicant has a number of filings, the cost would be based on the minimum to file an application, amendments, etc. for non-cellular or non-initial cellular. Even applicants in small rural areas should be able to absorb this additional expense. When microfiche services are not available locally, they can be obtained by mailing or overnight express mailing applications to a larger city in order to comply with the rule. As previously stated, initial cellular applicants, some of who were located in less than urban areas and even rural areas, have been filing on microfiche since 1985. This added cost and administrative burden on applicants is minor in terms of the facilities, people, and money involved in constructing and operating a public mobile station. The rule does not require applicants to incur the greater expense of starting their own in-house microfiche services; this would be strictly voluntary. Thus, the new rule does not impose an excessive burden on applicants, only a nominal additional business expense.

19. The Notice stated that we were considering exempting submissions of one or two pages from the microfiche requirement. BellSouth, Centel, and SBC suggested that this exemption be expanded to at least five pages, since virtually no filings are one or two pages. We adopt this suggestion as a modification of our proposal. There are a number of filings that would be five pages or less, for example, FCC Form 489 for a license to cover and certain modifications of a license, as well as requests for an extention of time. This modification also accommodates Romulus's suggestion that an extention of time be exempted specifically from the microfiche requirement. Therefore, we will exempt the submission of five pages or less from the requirement to file on microfiche. This will also alleviate the concerns of FWCL that there will be a delay in service caused by the additional time required to have FCC Form 489 microfiched. We will bear the responsibility of having these short filings of five pages or less microfiched for storage in the station files. This cost saving, although benefitting all applicants, will probably be more beneficial to a small company than a large company which could afford the cost better. This should substantially reduce the burden in submitting filings on microfiche.

20. Several commenters expressed concern about the additional time to prepare an application, and especially time to get FCC Form 489 (Notification of Status of Facilities Under Part 22 of FCC Rules) filed after construction. We do not view the microfiche requirement as causing a great delay in service to the public. Most microfiche companies offer a turnaround time of 48 hours and less than 48 hours for an additional fee. This time is not unreasonable and should not create an undue burden on applicants. With the knowledge of this additional requirement, applicants must factor this time into their preparation schedule. In addition, with the exemption of submissions of five or less pages from the microfiche requirement, most filings of FCC Form 489 will be exempt from the requirement.

21. We disagree with SBC's argument that the microfiche requirement will be costly, burdensome and not equally distributed among Commission applicants and licensees. The proposal was evaluated in terms of the cost and burden that would be placed on the public, as well as the benefits that would be derived from the new requirement. Compared with the efficient and expeditious manner that the Commission will be able to provide service to the public, the cost of having filings microfiched is quite nominal for a for profit business. The new requirement treats all Part 22 licensees equally.[18] Previously only initial

cellular applicants filed on microfiche, now non-initial cellular and non-cellular applicants must also file on microfiche.

22. As requested by Pacific Companies, B&M, and Vega we will clarify and modify the microfiche specifications as proposed in the Notice to be compatible with industry standards. Instead of 4 x 6 inches, the size of the microfiche should be 148mm X 105mm. It must be negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction, and applicants will have a choice of submitting microfiche sheets or microfiche jackets.[19] In addition because silver halide for all copies would be excessive and costly to the public, only one microfiche set must be submitted on silver halide master microfiche or a copy made on silver halide film such as Kodak Direct Duplicatory Film, and diazo microfiche may be used for the duplicates. Both the silver halide original and the copies must be of high enough resolution that all characters on the original document are legible on the microfiche when projected on a microfiche reader. The microfiche must be placed in a microfiche envelope.[20]

23. Some commenters stated that the microfiche requirement will not reduce space in the reference room or the need for additional personnel. They note that non-initial cellular and non-cellular applicants will still have to submit a paper original application. While this is true, the paper original applications will not be a part of the permanent record that will have to be stored. The equipment and facilities to house microfiche files require less space than those for paper files. Also, any need for additional microfiche copy equipment in the public reference rooms is the responsiblity of the Commission's contractor, currently International Transcription Service, Inc. (ITS).[21]

24. The Notice also proposed that the requirement to file FCC Form 430 annually be eliminated for Part 22 licensees. We adopt this proposal. It was supported overwhelmingly by the comments; Offshore voiced the only objection. Offshore's concern about having to repeat the officers and directors of its subsidiaries each time it files an application is already alleviated if it meets the requirements in Section 22.13(b) of the rules.[22] Elimination of this requirement will save time and money for applicants, as well as time for Commission personnel. However, it was brought to our attention by P&C that FCC Form 490 refers to the FCC Form 430 and the information contained therein. Although the staff seldom uses most of the information contained in Form 430 when processing FCC Form 401 applications, this information is important in processing the FCC Form 490, because it is essential to consider the other ownership interests of an applicant. Therefore, Section 22.11(a)[23] is amended to require that Part 22 licensees need no longer annually file FCC Form 430 except that they must continue to file FCC Form 430 in response to line 18 of FCC Form 490. This will be much less burdensome than requiring all Part 22 licensees to file FCC Form 430 annually.

REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

25. **Reasons for action and objectives.** The GAO report on the Commission's reference rooms and the problems in locating files, the condition of files, and general security of Commission records has prompted this action. There has been an increasing number of applications filed and stored in the MSD generating a need for a change in procedure that would give the Commission the greatest administrative flexibity in meeting the needs of the public. It was imperative that a method be devised that would provide a system of storage and retrieval of filings that would enable the public to use the reference room with greater assurance and confidence. In addition, the Commission's proposal would reduce the need continually to add personnel to cope with the volume of work. Our objective is to provide service to the public with greater speed and efficiency.

26. **Issues raised by the public in response to the initial analysis.** We have taken into account the various issues raised by the public concerning the proposed rules. As a result of these comments, whenever possible, we have modified our proposal. For instance, the Notice stated that we were considering exempting submissions of one or two pages from the microfiche requirement. However, several commenters noted that virtually no filings are one or two pages, but there are a number of filings that would be five pages or less. They suggested that the exemption be expanded to reflect this. Based on this suggestion, in this order, we modify our proposal and exempt from our microfiche requirement filings that are five pages or less. We will bear the responsibility of having these short filings of five pages or less microfiched for storage in the station files. This should substantially reduce the burden in submitting filings on microfiche.

27. **Alternatives that would lessen impact.** We have reduced burdens whenever possible, however, we have to institute this new requirement in order to more efficiently carry out our duties under the Communications Act. We have modified the microfiche specifications in ways that will enable licensees to more readily comply with the requirement. In the Notice we stated that we would consider exempting filings of one or two pages from the microfiche requirement. However, we are exempting filings of five pages or less from the microfiche requirement. This will cover a substantial number of the filings on FCC Form 489 as well as extensions of time requests. The Commission will bear the responsibility for microfiching short filings of five pages or less. This should substantially reduce the burden on small entities to submit filings on microfiche. We will examine this Order in the future if necessary with the objective of determining if further modifications are required.

PAPERWORK REDUCTION ACT STATEMENT

28. As requested in comments received from Office of Management and Budget (OMB), this Order has identified the application forms in Part 22 of the rules which will be subject to this change in reporting medium. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified requirements and burdens upon the public which are subject to approval by OMB as prescribed by the Act.

ORDERING CLAUSES

29. Authority for this Rule Making is contained in Sections 1, 4(i) and (j), 301, 303 and 309 of the Communications Act of 1934, as amended, and Section 553 of the Administrative Procedure Act;

30. WHEREFORE, for the foregoing reasons, Part 22 of the Commission's Rules ARE HEREBY AMENDED as discussed herein and as shown in Appendix B below.

31. IT IS FURTHER ORDERED that the rule changes made herein and set force in Appendix B are subject to review by the Office of Management and Budget.[24]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties filing comments

Becker and Finerfrock (B&F)
Bell Atlantic Mobile System (BAMS)
Bell South Corporation (Bell South)
Blooston and Mordkofsky (B&M)
Centel Cellular (Centel)
Communications Transmission, Inc. (CTI)
Fisher, Wayland, Cooper and Leader
Offshore Telephone Co. (Offshore)
Pacific Bell, Nevada Bell, and Pactel Cellular (Pacific Companies)
PacTel
Pepper and Corazzini (P&C)
Romulus Engineering (Romulus)
Rule Radiophone (Rule)
Southwestern Bell Corporation (SBC)
Telocator
Vega Cellular Consultants (Vega)

Parties filing reply comments

Becker and Finerfrock (B&F)
GTE Mobilnet Inc. (GTE)
Southwestern Bell Corporation (SBC)
Telocator

APPENDIX B

AMENDED RULES SECTION

Title 47, Part 22 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 1, 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

2. Section 22.2 is amended by adding a definition in alphabetical order to read as follows:

Section 22.2 Definitions.

* * * * *

Non - initial cellular applications. Cellular applications not filed in a Commission announced filing window.

* * * * *

3. Section 22.6 is amended by revising paragraph (d) and by adding paragraphs (d)(1) and (d)(2) to read as follows:

Section 22.6 Filing of applications, fees, and numbers of copies.

* * * * *

(d) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms shall be submitted on microfiche with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by Section 1.743. (*See* Section 22.913 for specific filing requirements for applications for initial cellular, and Section 22.923 for specific filing requirements for applications for rural cellular radio communications system authorizations.) Filings of five pages or less are exempt from the requirement to submit on microfiche. Non-cellular and non-initial cellular applicants and those filing any amendments, corespondence, pleadings, and forms must simultaneously submit the original hard copy which must be stamped "original".

(1) Microfiche Copies. Each microfiche copy should be a copy of the signed original. Each microfiche copy shall be a 148mm X 105mm negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a 5" X 7.5" envelope. All applicants must leave Row "A" (the first row for page images) of the first fiche blank for in-house identification purposes.

(2) Non-cellular and Non-Initial Cellular Applications. All non-cellular and non-initial cellular applications must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche: 1) the name of the applicant; 2) the city and state of the application and 3) if the application refers to an existing station, the call sign of the station.

* * * * *

4. Section 22.11 is revised to read as follows:

Section 22.11 Miscellaneous forms shared by all domestic public radio services.

(a) Licensee qualifications. FCC Form 430 ("Common Carrier and Satellite Radio Licensee Qualifications Report") shall be filed by Mobile Service licensees only as required by Form 490 (Application for Assignment or Transfer of Control Under Part 22).

FOOTNOTES

[1] 3 FCC Rcd 2172 (1988).

[2] FCC Form 430 is the Common Carrier/Satellite Radio License Qualification Report. The Notice proposed to eliminate the annual filing of FCC Form 430 for Part 22 licensees only and did not propose to alter any filing requirement of FCC Form 430 for other licensees.

[3] Additionally, the Office of Management and Budget (OMB) sent a letter after the comment period closed.

[4] Non-initial cellular applications are cellular applications not filed in a Commission announced filing window.

[5] One copy would be for staff use, one for public use, and the third copy stored in the Commission's permanent records.

[6] The Paperwork Reduction Act directs agencies to review all recordkeeping requirements and to reduce or eliminate those requirements where possible. As required by that Act, the Notice was submitted to OMB for approval. Because certain information was not included in the proposal, OMB declined to give its approval until after submission of the final rule. OMB requests that the Commission clearly identify what applications and filings are affected by the microfiche order. OMB also requests additional information to enable it to evaluate how the change to microfiche fits in with the Commission's overall information filing, storage, and retrieval systems. In addition, OMB requests that the Commission provide an Information Systems and Technology Plan in order for OMB to determine the practical utility of converting to microfiche. On July 11, 1988, the Commission submitted a copy of its *FY 1988 Strategic Plan for Information Resources Management* to OMB.

[7] The purpose of the Regulatory Flexibility Act is to make agencies consider the impact of their regulations on small entities and to adjust those regulations when possible to minimize any significant economic impact on a substantial number of small entities.

[8] *Notice of Proposed Rule Making*, CC Docket No. 80-57, 47 Fed. Reg. 43842, (1982); *Report and Order*, CC Docket No. 80-57, 95 FCC 2d 769 (1983).

[9] Telecommunications Management and Operations of FCC's Public Reference Rooms, GAO/RCED-88-83 (March 4, 1988).

[10] One commenter, who is licensed under Part 21 of the rules, mistakenly thought that the proposal applied to licensees under other parts of the rules. Part 21 of the rules concerns the Domestic Public Fixed Radio Services.

[11] Line 18 of FCC Form 490 requests that an applicant attach as an exhibit FCC Form 430 unless a current one is on file with the Commission.

[12] Applications include:

1. FCC Form 401 - Application for New or Modified Common Carrier Radio Station authorization Under Part 22.

2. FCC Form 489 - Notification of Status of Facilities Under Part 22 of FCC Rules.

3. FCC Form 490 - Application for Assignment or Transfer of Control Under Part 22.

[13] The Notice did not specifically state what was included under the term "correspondence." For purposes of this order, correspondence includes cover letters and other letters pertaining to the indicated applications, as well as comments and pleadings related to an applications.

[14] *Cellular Lottery Reconsideration*, 101 FCC 2d 577 (1985).

[15] *First Report and Order*, 60 RR 2d 1029 (1986); *Further Order on Reconsideration*, 64 RR 2d 1360 (1988).

[16] *Cellular Lottery Reconsideration, supra.*

[17] As stated by SBC, a GAO Report on the FCC's Public Reference Room noted problems the public had in locating files, and problems with the general security of Commission records. The report was based on information gathered during the period of May 1987 to September 1987. Since that time, however, these problems have been alleviated, as illustrated above, in large part because of our efforts to microfiche and cull our MSD files.

[18] The Commission secured OMB approval for initial cellular applicants' submission of microfiche applications on December 4, 1986, under OMB control no. 3060-0046.

[19] Microfiche sheet is a one piece microfiche, and microfiche jacket is the type of microfiche which holds 16mm film strips in transparent sleeves.

[20] A microfiche envelope is a paper envelope holding one or more microfiche, open at the top.

[21] ITS is the official FCC contractor for search, replacement and duplication of FCC file materials. ITS provides documents to customers on photocopies and microfiche.

[22] Section 22.13(b) of the rules provides that "where . . . exhibits . . . already on file with the Commission contain information which is required by an application form, the application may specifically refer to such information if:

(1) The information previously filed is over one 8 1/2" by 11" page in length and all information referenced therein is current and accurate;

(2) The reference states specifically where the previously filed information can actually be found, ..."

[23] Section 22.11(a) of the rules currently requires licensees to file an FCC Form 430 annually or if there is no change in status to submit a letter to that effect.

[24] A Public Notice will be issued when the new rules have been approved announcing their effective date.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NORTHWEST PIPELINE CORPORATION — File No. MW-2654

For a waiver of the Rules to permit lease of excess capacity on certain OFS facilities to transmit common carrier communications on an interim basis

WAIVER

Adopted: November 7, 1988; Released: November 16, 1988

By the Chief, Private Radio Bureau:

1. Northwest Pipeline Corporation (Northwest) is authorized a high capacity (T3-672 channel) Private Operational Fixed Microwave (OFS) digital communications system linking Spokane and Plymouth, Washington. The system consists of eight facilities (Stations WNES-609, WNEQ-493 through WNEQ-497, WNEQ-514 and WNEQ-513) employing frequencies in the 6 and 18 GHz bands. Northwest states that MCI Telecommunications Corporation (MCI) is interested in leasing excess capacity on Northwest's OFS system, on an interim basis, to transmit its common carrier communications. Because Section 94.9(b)(1) of the Commission's Rules, 47 C.F.R. § 94.9(b)(1), specifically prohibits common carrier communications on OFS frequencies, Northwest seeks waiver of that provision for this venture.

2. In support of the waiver request, Northwest claims that MCI has immediate need, critical to its market position, to provide high quality digital service from Plymonth into the Spokane area. The Plymonth area is unique, Northwest argues, in that it is somewhat remote geographically, not located on a main communications corridor and not large enough a business market to be considered a "first tier" communications market. With the exception of Spokane, most of the cities in the area are small, so that expensive and sophisticated communications services are not readily available. Northwest further states that MCI is planning and constructing its own digital microwave system, but the anticipated completion date is not until March 15, 1989. Its own OFS system is thus the only alternative available to meet MCI's immediate needs. Northwest therefore seeks a waiver of Section 94.9(b)(1), limited in time to twelve months and in capacity to 18 T-1 lines out of 28 available. No extensions or renewals would be requested. Northwest concludes that these limits will ensure sufficient capacity for its needs and for the needs of other Part 94 eligibles to which it provides excess capacity.

3. Pursuant to Section 1.3 of the Commission's Rules, 47 U.S.C. § 1.3, the Commission may waive any provision of its rules if it determines that good cause has been shown and that grant of the waiver does not undermine the policies embodied in the rule. *See WAIT v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983). Section 94.9(b)(1) is designed to ensure spectrum availability for private communications. Northwest does not here seek additional spectrum in connection with its waiver request. It has also certified that its system has sufficient capacity for its own requirements as well as those of MCI. Further, the waiver is requested for a fixed period of relatively short duration, and the licensee has agreed not to seek an extension of the waiver beyond the termination date. Under these limited circumstances, we conclude that a waiver of Section 94.9(b)(1) is in the public interest and will be granted on that basis.

4. Accordingly, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, Northwest Pipeline Corporation's request for waiver of Section 94.9(b)(1) IS GRANTED for a period not to exceed one year from the release date of this Order or until completion of the MCI microwave system, whichever occurs first. This waiver is expressly conditioned upon the licensee's representation that it will not seek extension of the waiver and its understanding that extension will not be granted.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 16, 1988

BELLSOUTH FILES REVISIONS TO COST MANUAL
PUBLIC COMMENT INVITED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required certain telephone companies to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. On January 14, 1988, the Common Carrier Bureau conditionally approved the BellSouth manual and required BellSouth to periodically update its manual. *See BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 128 (1988) (*BellSouth Order*). The *BellSouth Order* requires that revisions modifying cost categories, allocation methods, or time reporting be submitted at least 60 days prior to implementation of the changes.

On October 31, 1988, BellSouth filed proposed changes in the section of its manual that describes the cost categories and allocation mechanisms. It proposes to add several cost pools and to amend other cost pools.

Parties may file comments on the proposed revisions to the cost manual no later than **December 7, 1988.** Replies should be filed by **December 19, 1988.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036.

Copies of the revisions may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-488

In re Applications of	
Steven Heft d/b/a HEFTY COMMUNICATIONS, LTD.	File No. BPCT-870331QG
TUSKEGEE TELEVISION	File No. BPCT-870602KF
TUSKEGEE ASSOCIATES	File No. BPCT-870602KG
TUSKEGEE COMMUNICATIONS, INC.	File No. BPCT-870602KM
For Construction Permit Tuskegee, Alabama	

HEARING DESIGNATION ORDER

Adopted: September 30, 1988; Released: November 17, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 22, Tuskegee, Alabama; late-filed amendments filed by Tuskegee Associates;[1] a petition to deny filed by Marmet and McCombs Professional Corporation against Tuskegee Television; petitions to deny filed by Tuskegee Television and Tuskegee Associates against Tuskegee Communications, Inc., (Tuskegee Communications); and related pleadings.

2. On July 28, 1987, Marmet and McCombs Professional Corporation (M&M), filed a petition to deny Tuskegee Television's application seeking to raise character and financial issues against Wesley Godfrey,[2] one of the general partners in the applicant. M & M does not claim standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended, and we find none. Consequently, the petition must be dismissed. However, we will consider the petition as an informal objection filed pursuant to Section 73.3587 of the Commission's Rules.

3. M & M requests the Commission to deny Tuskegee Television's application because its general partner, Wesley Godfrey, failed to disclose that there are unresolved character issues pending against him arising from his involvement in an application for Shreveport, Louisiana, in MM Docket No. 83-687. Godfrey states, in response to the M & M allegations, that the issues were added by the presiding Administrative Law Judge against Godfrey and Associates, a partnership in which he had been a general partner, but not added against him. In fact, Wesley Godfrey alleges, his partnership interest had been terminated more than a year before the issues were added. Therefore, Godfrey concludes, it is Godfrey and Associates, not he, who has outstanding unresolved character issues.[3]

4. It appears that the presiding Administrative Law Judge added the following issues against Godfrey and Associates in MM Docket No. 83-687:

> (a) To determine whether Wesley Godfrey is a principal or real party in interest or is otherwise involved in Godfrey and Associates and, if so, the effect thereof on Godfrey's basic and comparative qualifications; and
>
> (b) To determine (1) all the facts and circumstances surrounding Wesley Godfrey's August 16, 1983 letter to Senator J. Bennett Johnston, (2) whether said letter constitutes a solicitation of an *ex parte* presentation in violation of Section 1.1225 of the Commission's Rules, (3) whether Godfrey and Associates has violated Section 1.1245 of the Commission's Rules by its failure to report the facts and circumstances surrounding the letter, and (4) the effect of the evidence adduced on Godfrey's basic and comparative qualifications.

Although the issues were added after Wesley Godfrey had disassociated himself from the application, the issues clearly centered on Godfrey and his conduct in relation to the application under consideration in MM Docket No. 83-687. A "real party in interest" question implies a failure to disclose material facts, lack of candor or even concealment and deception. The application of Godfrey and Associates was dismissed for failure to prosecute. Under the circumstances, we cannot find Wesley Godfrey qualified to be a Commission licensee without resolving the issues raised in MM Docket No. 83-687. Accordingly, appropriate issues will be specified in this proceeding.[4]

5. M & M also alleges that Godfrey was named as a defendant in a lawsuit for the involuntary dissolution and liquidation of the licensee of Station KDKS(FM), Benton, Louisiana. Godfrey is an officer and 25 percent shareholder in the licensee. M & M concedes that the action was dismissed, but it believes that the court papers raised serious questions concerning the operation of KDKS(FM) which should be considered in this proceeding. We decline to further examine this matter. The court papers contain only unproven allegations in a cause of action which was dismissed by the court on the basis of a settlement agreement between the parties. There are no allegations that any of the Commission's Rules have been violated. The Commission is neither equipped nor authorized to try allegations made in civil complaints and disposed of by a court of competent jurisdiction.[5]

6. By Public Notice, Report No. A-128, released April 30, 1987, *TV Broadcast Applications Accepted for Filing and Notification of Cut-Off Date*, the Commission accepted Steven Heft's application for filing and set a cut-off date of June 2, 1987, for the filing of competing applications. In response to that notice, three competing applica-

tions were filed. The applications of Tuskegee Television and of Tuskegee Associates were each accompanied by a check for2250 to cover the fee for processing a new commercial television application, as set by Section 1.1104 of the Commission's Rules. Tuskegee Communications' application, however, was accompanied by a check for only2000, and, accordingly, was returned on June 8, 1987. Upon receipt of the returned application, Tuskegee Communications immediately resubmitted it with the appropriate fee, and it was received by the Commission on June 12, 1987. Subsequently, on June 26, 1987, Tuskegee Communications filed a motion seeking the acceptance of its application *nunc pro tunc*, in support of which it argued that it had been misinformed as to the appropriate fee. Tuskegee Communications' application was accepted for filing on July 13, 1987, constituting grant of its motion. Tuskegee Associates' and Tuskegee Television's petitions to dismiss followed on August 18, 1987.

7. In support of their petitions, Tuskegee Associates and Tuskegee Television argue that Section 1.1107(b) of the Rules provides that "filings for which no remittance or for which insufficient remittances are received shall be dismissed and the application returned . . . without processing." They add that late payments are permitted only when the underpayment is not discovered within 30 days of receipt, which was not the case here. Accordingly, they conclude that acceptance of the resubmitted application violated the Commission's Rules and fee collection policy as well as the Commission's cut-off procedures. In opposition, Tuskegee Communications contends that it submitted a check for2000 only after one of its principals called the Commission and was assured that it was the appropriate amount. In response, Tuskegee Television argues that none of the competing applicants were served with copies of the June 26 motion nor were they given actual notice of the staff's action accepting the application. Consequently, it maintains that the Commission's *ex parte* rules were violated.

8. Fee collection at the Commission began on April 1, 1987. In the Rule Making proceeding on the establishment of the fee schedule, several parties, including the National Association of Broadcasters, expressed concern that the public might not fully understand the new procedures. One commenter, in fact, suggested that ombudsmen be appointed in the various offices to help individuals and companies to understand the Commission's fee rules in order to avoid exposure to added fees or penalties. While the Commission rejected that specific proposal, it was, nevertheless, committed to the goal of avoiding public confusion and uncertainty as to what would be required under the fee program. Consequently, on March 2, 1987, the Commission issued a special news release (Mimeo No. 2127) announcing the establishment of a telephone "hotline" to provide guidance on the amount of fees and filing procedures. In doing so, the Commission recognized that entities would be filing fees based on the information received from the "hot line." When the principal of Tuskegee Communications called the Commission to ascertain the correct fee, the "hot line" had been in operation less than three months. It is not unreasonable to believe that, during these early months, some erroneous information could have been disseminated, and we will give credence to applicants who, during these initial months, allege that they were misinformed by the Commission as to the correct fee amount. The fee staff, however, is now more familiar with the fee schedule. We further note that, once advised of its error, the applicant immediately submitted a check for the correct amount, which was received before the applications of Tuskegee Television and Tuskegee Associates were accepted for filing. Thus, the competing applicants for the channel would not be prejudiced by the acceptance of Tuskegee Communications' application.

9. Moreover, this case is unlike the situation in *220 Television, Inc.*, 81 F.C.C. 2d 575 (1980), where an employee of 220 Television's law firm telephoned the staff to determine whether any applications had been filed for the channel and, if so, whether a cut-off date had been set. Although such a date had been established, the employee was allegedly informed to the contrary. In denying 220 Television's waiver request, the Commission stated that official files and records were readily accessible to the public and that it is the potential applicant's responsibility to consult those sources, rather than rely upon informal inquiries to the staff. By contrast, in this case, the Commission has specifically told the public to call the fee "hotline" for information in that regard, and we will not penalize Tuskegee Communications for following that instruction. Consequently, we are unpersuaded that we erred in accepting Tuskegee Communication's application for filing *nunc pro tunc*. Since that is the case, the Commission's cut-off rule is not called into question. Finally, while the competing applicants should have been served with a copy of Tuskegee Communications' June 26 motion, we again note that petitioners' applications had' not been accepted for filing at that time, and Tuskegee Communications could' not have been aware of the applications. The very presence of petitioners' pleadings, however, indicates that their right to object has not been sacrificed.' Accordingly, for the reasons stated, Tuskegee Television's and Tuskegee' Associates' petitions to dismiss will be denied.

10. The technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. No determination has been reached that the tower height and location proposed by each applicant would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

12. Ellis M. Hall, general partner and 20 percent owner of Tuskegee Television, owns 22.5 percent of the licensee of Stations WBIL(AM) and WBIL-FM, Tuskegee, Alabama. Section 73.3555 of the Commission's Rules states that no license for a television broadcast station shall be granted to any party if such party directly or indirectly owns, operates or controls an AM or FM broadcast station and the grant of such license will result in the Grade A contour of the television station encompassing the entire community of license of the AM or FM station. Consequently, a grant of the instant application could violate the rule. However, Tuskegee Television has represented that if it is the successful applicant in this proceeding, Mr. Hall will divest himself of all interest in the licensee of

Stations WBIL(AM) and WBIL-FM. Accordingly, any grant of a construction permit to Tuskegee Television will be appropriately conditioned.

13. Section II, item 4(a), FCC Form 301, requires an applicant to specify the name and residence of each of its principals. Tuskegee Television specifies the names of its partners and the city and state where each resides, but not their home addresses (number, street, etc.). Accordingly, Tuskegee Television must submit an amendment which specifies the home address of each partner to the presiding Administrative Law Judge within 30 days after this Order is released.

14. Wallace R. Walls, Sr., a general partner and 12 percent owner of Tuskegee Associates, is also the sole general partner of Florida Manatee TV Broadcast Associates (Florida Manatee), which filed an application (BPCT-870731LP) for a construction permit for a new commercial television station to operate on Channel 66, Bradenton, Florida. On November 24, 1987, the Chief, Video Services Division, Mass Media Bureau, adopted a Hearing Designation Order in MM Docket No. 87-532 (released December 2, 1987), designating for comparative hearing Florida Manatee's application as well as 9 others for Channel 66. By *Memorandum Opinion and Order*, FCC 88M-1118, released April 14, 1988, in MM Docket No. 87-532, the presiding Administrative Law Judge added financial certification and related misrepresentation/lack of candor issues against Florida Manatee. However, Florida Manatee voluntarily dismissed its application, consequently, these issues were never resolved. Since, without resolution of these issues, we cannot make a determination that Mr. Walls is qualified to be a licensee, appropriate issues will be added in this proceeding.

15. Section II, item 8(b), FCC Form 301, inquires whether any member of the immediate family (i.e. wife, father, mother, brother, sister, son or daughter) of any party to an application has any interest in, or connection with, any other broadcast station or pending broadcast application. Heft answered the question "N/A". However, the question requires a "yes" or "no" answer. Accordingly, Heft must submit an amendment which contains his answer to item 8(b) to the presiding Administrative Law Judge within 30 days after this Order is released.

16. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. Heft has not submitted such an exhibit. Accordingly, Heft must file the appropriate exhibit with the presiding Administrative Law Judge within 30 days after this Order is released.

17. The contour distances shown by Heft in Section V-C, item 15, FCC Form 301, have not been calculated in accordance with Section 73.684 of the Commission's Rules. Consequently, the contour map furnished by Heft is necessarily incorrect. Accordingly, Heft must submit an amendment which includes the correct area and population figures for item 10(e), properly calculated distances for item 15, and an accurate contour map, to the presiding Administrative Law Judge within 30 days after this Order is released.

18. From our review of the proposal submitted by Tuskegee Communications, we cannot determine whether the applicant is in compliance with the revised environmental rules set forth in the Report and Order in General Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the revised rules, an applicant must determine whether the radiation hazard of its proposal would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the application is subject to environmental processing under the Section 1.1307 criteria, the applicant must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission's Rules. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of the application submitted by Tuskegee Communications suggests that it has not followed the procedures outlined above. While it is unlikely that an RF problem exists as a result of the height and power proposed, other factors must be evaluated by Tuskegee Communications in making a final determination. Tuskegee Communications will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have an adverse effect on the quality of the environment, with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, a contingent environmental issue will be specified, and the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

19. The coverage map submitted by Tuskegee Communications, in response to Section V-C, item 16, FCC Form 301, is insufficient. Moreover, examination of the tabulation of data submitted in response to Section V-C, item 19, reveals that the figure for antenna height above average terrain shown in Section V-C, item 7, does not agree with the average of the 8 radial heights or match the value shown in the other engineering exhibits. Accordingly, Tuskegee Communications must submit an amendment which contains a coverage map that shows clearly, legibly and accurately all of the information required by item 16 (a-c) and which corrects the discrepancies between items 7 and 19, as well as the values on the other engineering exhibits.

20. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by each applicant would constitute a hazard to air navigation.

2. To determine, with respect to Tuskegee Television:

(a) whether Wesley Godfrey was a principal or real party in interest or was otherwise involved in Godfrey and Associates, an applicant for Channel 33, Shreveport, Louisiana, in the proceeding in MM Docket No. 83-687 and, if so, the effect thereof on Wesley Godfrey's basic qualifications; and

(b) (1) all the facts and circumstances surrounding Wesley Godfrey's August 16, 1983 letter to Senator J. Bennett Johnston, in MM Docket No. 83-687, (2) whether said letter constituted a solicitation of an *ex parte* presentation in violation of Section 1.1225 of the Commission's Rules, and (3) the effect, if any, of the evidence adduced on Godfrey's basic qualifications.

(c) in light of the evidence adduced in 2(a) and 2(b), above, the effect, if any, upon the applicant's basic qualifications.

3. To determine, with respect to Tuskegee Associates:

(a) whether, at the time it filed its application (BPCT-870731LP) for a construction permit for a new commercial television station to operate on Channel 66, Bradenton, Florida, in MM Docket No. 87-532, Florida Manatee TV Broadcast Associates was financially qualified to construct and operate the facility proposed;

(b) in the event that issue 3(a) is resolved in the negative, whether Florida Manatee TV Broadcast Associates engaged in misrepresentations or was otherwise lacking in candor in certifying its financial qualifications in its application in MM Docket No. 87-532; and

(c) in light of the evidence adduced pursuant to issues 3 (a) and 3(b), above, the effect, if any, upon the applicant's basic qualifications.

4. If a final environmental impact statement is issued with respect to the proposal of Tuskegee Communications, Inc., in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301 - 1319 of the Commission's Rules.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

22. IT IS FURTHER ORDERED, That the petition to deny the application of Tuskegee Television, filed by Marmet and McCombs Professional Corporation, IS DISMISSED and, when considered as an informal objection, IS GRANTED to the extent noted herein and IS DENIED in all other respects.

23. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1 and Marmet and McCombs Professional Corporation IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

24. IT IS FURTHER ORDERED, That Tuskegee Associates' September 30, 1987, and July 1, 1988, amendments ARE ACCEPTED for Section 1.65 purposes only.

25. IT IS FURTHER ORDERED, That the petitions to dismiss filed by Tuskegee Television and Tuskegee Associates against Tuskegee Communications, Inc. ARE DENIED.

26. IT IS FURTHER ORDERED, That Steven Heft d/b/a Hefty Communications, Ltd. shall submit an amendment which contains his answer to Section II, item 8(b), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

27. IT IS FURTHER ORDERED, That Steven Heft d/b/a Hefty Communications, Ltd. shall submit his response to Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

28. IT IS FURTHER ORDERED, That Steven Heft d/b/a Hefty Communications, Ltd. shall submit an amendment which contains the information required by paragraph 16, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

29. IT IS FURTHER ORDERED, That Tuskegee Television shall submit an amendment which contains the home address of each of its partners, to the presiding Administrative Law Judge within 30 days after this Order is released.

30. IT IS FURTHER ORDERED, That, in the event that Tuskegee Television is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Ellis M. Hall has divested himself of all interest in, and connection with the licensee of Stations WBIL(AM) and WBIL-FM, Tuskegee, Alabama.

31. IT IS FURTHER ORDERED, That Tuskegee Communications, Inc. shall submit an amendment which contains an environmental statement as explained in paragraph 17, above, to the presiding Administrative Law Judge and a copy to each the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

32. IT IS FURTHER ORDERED, That Tuskegee Communications, Inc. shall submit an amendment which contains the information required by paragraph 18, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

33. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attor-

ney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to his notice of appearance a remittance of6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

34. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] On September 30, 1987, and July 1 1988, (after the "B" cut-off date of August 18, 1987) Tuskegee Associates filed amendments to update its application pursuant to Section 1.65 of the Commission's Rules. The amendments will be accepted for 1.65 purposes only.

[2] On August 18, 1987, (the "B" cut-off date) Wesley Godfrey filed an amendment to his application to change the applicant from a sole proprietorship to a general partnership. Godfrey retains 74 percent ownership of the applicant.

[3] It appears that relatives of Wesley Godfrey, including his brother Kirk Godfrey, made up the partnership.

[4] Those same issues were added in another proceeding involving Godfrey and Associates, which was also dismissed for failure to prosecute.

[5] M & M also alleges that it has obtained a judgment for unpaid legal fees in the District of Columbia Superior Court against Wesley Godfrey. M & M seeks to raise a financial qualifications issue against Godfrey on the basis of Godfrey's failure to pay the judgment. Failure to pay a debt does not mean that a debtor is unable to pay. M & M has provided no information challenging Tuskegee Television's certification that it is financially qualified and we find no basis for adding a financial issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BELL ATLANTIC TELEPHONE COMPANIES — AAD 8-1922

Petition for Waiver of the Commission's Requirement for Computing the General Allocator

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1988; Released: November 17, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 14, 1988, the Bell Atlantic telephone companies (Bell Atlantic) filed a petition for waiver seeking permission to calculate the general allocator prescribed in Section 64.901(b)(4) of the Commission's Rules using current month data rather than three-month data.[1] Bell Atlantic's petition was placed on public notice on March 29, 1988.[2] New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) and BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed comments in support of the petition on April 12, 1988. [3] For the reasons set forth below, we deny Bell Atlantic's request.

II. BACKGROUND

2. In the *Joint Cost Order*,[4] the Commission established a hierarchy of allocation techniques which carriers are to use in allocating costs between regulated and nonregulated activities.[5] The least preferable of those techniques, to be used only when no cost-causative allocation method is available, is the use of a general allocator. The general allocator is "computed by using the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities."[6]

3. The *Joint Cost Order* instructed carriers to calculate the general allocator each month using current monthly data.[7] On reconsideration, the Commission decided that this method would cause administrative problems for the carriers and delay the cost allocation process, since all expenses for the current month would have to be recorded before the general allocator could be derived and applied to the various cost categories. The Commission also noted that use of quarterly data will better reflect nonregulated growth trends. The Commission therefore changed the rule to require calculation of the general allocator using data collected in the three-month period ending two months before the current month.[8]

4. In its petition, Bell Atlantic requests that it be permitted to calculate the general allocator using the Commission's original method. Bell Atlantic states that it has developed a mechanized system by which it can calculate the general allocator using the current month's expenses without causing any delay in the cost allocation process. Bell Atlantic argues that the Commission's new method for calculating the general allocator presents several administrative problems, especially for the first five months of 1988. It states that for that period, the general allocator must be calculated using 1987 data, which must be first adjusted to reflect implementation of the Commission's revisions to parts 32 and 36 of the Rules. Furthermore, it states that the carriers must separate the regulated and nonregulated costs to develop a ratio equal to the general allocator without the benefits of a 1987 cost manual which would permit them to do so. Finally, it contends that the use of current data would more accurately match the allocation of residual costs with the allocation of the underlying regulated and nonregulated activities.[9]

III. DISCUSSION

5. We deny Bell Atlantic's request for waiver to permit it to calculate the general allocator for joint costs using current monthly data, because it has not met the requirements for grant of a waiver. Bell Atlantic has failed to provide a good cause showing of unique or extraordinary circumstances that requires it to depart from a rule of general applicability which the Commission recently adopted after extensive comment on the subject. Although Bell Atlantic may have overcome the administrative difficulties that led the Commission to replace the one-month procedure with a three-month procedure, it does not address the Commission's concern that the three-month procedure better reflects non-regulated growth trends.[10]

6. Bell Atlantic correctly points out that there are problems in complying with the *Joint Cost Order*'s procedures in early 1988, because carriers must base their allocations on the three-month period ending two months before the current month of 1988. For most of the first two quarters of 1988, this means that carriers would have to compile cost allocation data from 1987. We recognize that carriers were required only to compile cost allocation data as of January 1, 1988, and that the data for 1987 might not be available. In light of these circumstances, we will permit Bell Atlantic, and any other carrier, to base its general allocator for the first quarter of 1988 on data that it can reasonably collect for a period less than three months. Thus, a carrier may use data for only one or two months of the three-month period for the first quarter computation. We think that this procedure will satisfactorily resolve any problems that Bell Atlantic or other carriers may have complying with the *Joint Cost Order*.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That the Petition for Waiver filed on March 14, 1988, by the Bell Atlantic telephone companies IS DENIED, subject to the considerations noted herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] US West filed a similar petition for waiver on December 18, 1987, assigned file no. AAD 8-1923. It requested permission on September 28, 1988 to withdraw that petition. US West's request is granted.

[2] Bell Atlantic and U S West Seek Permission to Calculate General Allocator Using Current Monthly Data, 3 FCC Rcd 1785 (1988).

[3] In its comments, NYNEX requested a similar waiver. The comment cycle is not the appropriate means to petition for waiver of the Commission's Rules. Therefore, we will not address NYNEX's waiver request.

[4] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order), recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order), further recon.*, FCC 88-355 (adopted November 1, 1988), *petitions for review pending, Southwestern Bell Tel. Corp. v. FCC*, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987); *National Tel. Cooperative Ass'n v. FCC*, D.C. Circuit No. 87-1771 (filed Dec. 15, 1987).

[5] *See* 47 CFR Section 64.901 (b).

[6] 47 CFR Section 64.901(b)(3)(iii).

[7] *See Joint Cost Order*, 2 FCC Rcd at 1320, para. 173.

[8] *Reconsideration Order*, 2 FCC Rcd at 6292.

[9] BellSouth supports Bell Atlantic's petition only if it is limited to Bell Atlantic and not made applicable to all carriers. BellSouth states that it has developed its own mechanized manner of calculating the general allocator which is in accordance with the *Reconsideration Order* and that the method proposed by Bell Atlantic would present administrative problems to BellSouth.

[10] *Reconsideration Order*, 2 FCC Rcd at 6292, para. 83.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

REPORT NO. DS-790

GE AMERICAN	2971-DSS-P/LA-88
COMMUNICATIONS,	2972-DSS-P/LA-88
INC.	2973-DSS-LA-88
	2965-DSS-ML-88

PUBLIC NOTICE

Released: November 15, 1988

Applications for authority to construct launch and operate two C-band domestic fixed-satellites, Satcom C-3 and C-4, to replace GE Americom's Satcom F III R and F IV satellites, and to launch a previously authorized on-ground spare satellite (*see RCA American Communications, Inc.*, 84 FCC 2d 633 (1981)) to replace Satcom F IR. The satellites proposed to be constructed would each carry 24 transponders, each with a bandwidth of 36 MHz and an output power of 16 watts. The C-3 satellite would provide service to the 48 contiguous states, Alaska, Hawaii and the Carribean at a maximum EIRP of 40 dBW. The C-4 satellite would provide service to the 48 contiguous states and the Carribean, and would have a spot beam covering Hawaii at a maximum EIRP of 41 dBW. The applicant requests the same locations currently assigned to its present satellites, namely 81' W.L., 130' W.L. and 138' W.L., subject to the requests in the application described below.

By separate application, GE American Communications, Inc. is requesting the assignment of new orbital locations to its proposed C-4 satellite and its in-orbit K-1 satellite. With respect to C-4, which is proposed to replace Satcom F-4 currently operating at 81' W.L., the applicant is requesting a location between 85' W.L. and 101' W.L., but preferably 97' W.L., in order to better provide 50 state coverage. In addition, the applicant is requesting that its currently operating K-1 satellite be assigned a more westerly location in order to bring it closer to the other GE American Ku-band satellites. K-1 is presently operating at 85' W.L. but is required to move to its assigned location of 67' W.L. when K-3, which is assigned to 85' W.L., is launched. According to the applicant, a position between 75' W.L. and 89' W.L. will facilitate better customer service.

Copies of these applications, as well as any pleadings filed pursuant to this notice, will be available for inspection in the Domestic Facilities Public Reference Room, 2025 M St. N.W. Washington, D.C., Room 6220.

For further information, please contact Rosalee Gorman at (202) 634-1624.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

McCAW CELLULAR
COMMUNICATIONS, INC.,
Complainant,

v. File No. E-88-82

US WEST NEWVECTOR
GROUP, INC.,
Defendant.

In the Matter of

US WEST NEWVECTOR GROUP, INC. File No. ENF-88-21

Petition for Declaratory Ruling
about the Provision of Roaming
Service Under Section 22.911(b)
of the Commission's Rules and
the Communications Act of 1934

ORDER

Adopted: October 20, 1988; Released: November 16, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 22, 1988, McCaw Cellular Communications, Inc. (McCaw) filed a complaint against U S West NewVector Group, Inc. (NewVector) alleging that NewVector's refusal to provide automatic roaming services to McCaw's Denver, Colorado subscribers traveling in areas adjacent to Denver was at variance with the Commission's policies and violated Sections 201(a), 202(a) and 314 of the Communications Act, 47 U.S.C. §§ 201(a), 202(a) and 314. NewVector denied such allegations and on August 29, 1988, filed a Petition for Declaratory Ruling on the same subject matter. McCaw moved to consolidate the complaint proceedings with NewVector's petition. After the pleading cycle ended, the parties entered into negotiations aimed at settling the matters in controversy.

2. By joint motion filed October 17, 1988, the parties advised the Commission that they have reached a mutually satisfactory settlement and requested that the complaint and Motion to Consolidate Proceedings be dismissed with prejudice. NewVector also requested permission to withdraw its Petition for Declaratory Ruling.

3. On the basis of the statements contained in the joint motion, we conclude that there are no longer issues in controversy and the proceedings should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the joint motion to dismiss the complaint IS GRANTED with prejudice.

5. IT IS FURTHER ORDERED that the Motion to Consolidate filed by McCaw is dimissed as MOOT.

6. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by NewVector IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-111

In the Matter of

Separation of costs of regulated telephone service from costs of nonregulated activities

Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies, to provide for nonregulated activities and to provide for transactions between telephone companies and their affiliates.

ORDER ON FURTHER RECONSIDERATION

Adopted: November 1, 1988; Released: November 18, 1988

By the Commission:

I. INTRODUCTION

1. The Bell Atlantic Telephone Companies (Bell Atlantic) and the New York State Department of Public Service (NYDPS) petition this Commission for reconsideration of certain portions of our *Order on Reconsideration* herein.[1] Bell Atlantic seeks a change in the manner in which we require carriers to account for tariffed services provided to their own nonregulated activities. NYDPS asks us to reconsider our decision to allow carriers to allocate common investment in network plant on the basis of three-year forecasts of relative regulated and nonregulated usage. In this Order we deny the NYDPS petition and grant in part and deny in part the Bell Atlantic petition. The petitions are discussed separately below.[2]

II. THE BELL ATLANTIC PETITION

A. *Background*

2. The cost allocation standards which we adopted in the *Joint Cost Order* require that, when carriers provide tariffed services to their nonregulated activities, they provide such services at the tariff rate. Section 64.901(b)(1) of our Rules states:

> Tariffed services provided to a nonregulated activity will be charged to the nonregulated activity at the tariffed rates and credited to the regulated revenue account for that service. [3]

The rule prescribes a credit to regulated revenues in order to ensure that revenues associated with the tariffed offerings which a carrier uses in the provision of nonregulated products and services are treated as regulated revenues in the determination of tariffed rates and in the calculation of rates of return on regulated investment.

3. The *Joint Cost Order* did not specify the account to which the corresponding debit was to be entered. The rule could be read to require a debit either to an expense account or to an account for nonregulated revenues. We subsequently realized that, although the cost of a tariffed service used by a nonregulated activity might be thought of as an "expense" of the nonregulated activity, charging that cost to an expense account would result in misstatement of total company expenses and revenues. On our own motion, therefore, we included in the *Order on Reconsideration* the following clarification of the manner in which carriers are to account for tariffed services used by their nonregulated activities:

> As stated in the *Order*, the full tariffed rates will be credited to the regulated revenue accounts. The corresponding debit entry shall be made to account 7991, "Other nonregulated revenues." Customer billings for enhanced services which include or utilize basic services charged to the nonregulated activity in the manner required herein will be recorded in full in account 7991.[4]

We amended the description of Account 7991 to reflect this use of the account.[5]

B. *The Bell Atlantic Petition*

4. In its petition for reconsideration, Bell Atlantic asserts that the use of Account 7991 to record charges for tariffed services violates generally accepted accounting principles (GAAP) in that it requires operating revenues to be included in a nonoperating account.[6] Bell Atlantic states that, because the prescribed accounting method violates GAAP, Bell Atlantic would have to reclassify these revenues for financial accounting purposes. Bell Atlantic asks that we instead require carriers to account for nonregulated revenues within the operating revenue accounts, using unique subaccounts to record and track nonregulated revenues.[7] Bell Atlantic describes its accounting method as follows:

> The tariffed portion of any nonregulated activity is credited to the proper operating revenue account, through the use of Universal Service Order Codes (USOCs), when customers are billed. The difference between the amount of the total billing and the tariffed portion is credited to the proper operating revenue account through the same process. Accordingly, the revenues are appropriately reported and no further journalization or reclassification is necessary. Proper controls already exist in the billing system to ensure the accuracy of this process.[8]

C. *Responsive Pleadings*

5. NYNEX supports the Bell Atlantic petition. NYNEX argues that the approach prescribed by this Commission will result in a misalignment of operating revenues and operating expenses, since most expenses associated with

nonregulated activities will be classified as operating, while the revenues from such activities will be classified as nonoperating.

6. AT&T, Ameritech, Southwestern Bell, and U S West oppose changing the rule for all carriers, though they all suggest that we should consider a waiver of our rules to allow Bell Atlantic to use its preferred approach. AT&T states that Account 7991 is, in fact, an operating account and that Bell Atlantic's assertion that the prescribed accounting violates GAAP is, therefore, without merit. AT&T argues that it would be unfair to other carriers to require them to go to the expense of changing their accounting systems to solve a problem that is specific to Bell Atlantic. Southwestern Bell also states that it does not wish to change its accounting methods to those preferred by Bell Atlantic. Southwestern Bell suggests that, as an alternative to granting a waiver to Bell Atlantic, this Commission could establish a single nonregulated operating income account, for example, Account 5280, to be used instead of Account 7991.

7. Ameritech argues that using the 5000 series of accounts for nonregulated revenue would be inconsistent with the definition of those accounts as regulated revenue accounts. U S West states that the prescribed accounting method does not cause it a serious problem because it has created subaccounts within Account 7991 to facilitate reclassification of revenues recorded therein.

D. ***Reply***

8. In its reply to oppositions to its petition, Bell Atlantic notes that no party has opposed allowing Bell Atlantic to use its proposed accounting method. Bell Atlantic states that, contrary to AT&T's reading of the USOA, all accounts from 7300 through 7991 are classified as nonoperating. Bell Atlantic counters Ameritech's assertion that nonregulated revenues do not belong in the 5000 series of accounts with the claim that Ameritech's reading of the USOA would contradict the "explicit holding" of the *Joint Cost Order* that "investments, *revenues*, and expenses related to activities using common plant will be included in regulated accounts."[9] Bell Atlantic states that, while Southwestern Bell's alternative proposal to use a single operating nonregulated revenue account would comply with GAAP, Bell Atlantic's proposal to include nonregulated operating revenues within various accounts comports better with the requirements of the USOA.

E. ***Discussion***

9. Bell Atlantic's petition raises three distinct issues. First, should revenues derived from a nonregulated activity involving common or joint use of assets and resources in the provision of regulated and nonregulated products and services be accounted for in the 5000 series of revenue accounts or in the 7000 series of "other income" accounts? Second, if such nonregulated revenues are to be recorded in the 5000 accounts, should they be recorded in a single account or in various accounts? Third, should we allow Bell Atlantic and other companies to record these nonregulated revenues by using service order codes to split customer billings between regulated and nonregulated revenue accounts?

1. ***Use of 5000 series of accounts***

10. In retrospect, we agree with Bell Atlantic and NYNEX that it might have been better to have placed the account for nonregulated revenues in the 5000 series of accounts. Companies separate "operating" from "nonoperating" revenues in their external financial reports so that investors and others may discern how much of the total revenues derive from the ongoing, major operations of the business and how much derive from other sources. At one time a telephone company's "operating" revenues and its "regulated" revenues might have been one and the same. Now, however, nonregulated activities, such as enhanced services, are increasingly part of the ongoing operations of a telephone company. Revenues from such activities are thus, for published general use financial statement purposes, appropriately classified with other operating revenues. In this context, it would make sense to include nonregulated telecommunications revenues in the same set of accounts as is used for regulated telecommunications revenues. Using an account in the 5000 series would, as noted by Bell Atlantic and NYNEX, also be consistent with our decision in the *Joint Cost Order* to use the regulated investment and expense accounts for nonregulated activities which share assets or resources with regulated services.

11. On the other hand, no harm would be done to those who rely on company financial statements if we were to retain the current use of Account 7991. As several of the parties indicate, revenues in that account can readily be reclassified for financial reporting purposes. Such reclassification would be but one of a great many operations which are necessary to distill a company's accounts into a meaningful financial statement published for general use in the investment community. Although there would be some cost involved with this reclassification, there would also be some cost involved if we required all of the companies using the USOA to move their nonregulated revenues to one or more accounts in the 5000 series. There is no information in the record which would allow us to quantify these costs; the modest benefits to be gained from either alternative are likewise unquantified.

12. We have considered the merits of both accounting procedures and we conclude that it is best to acknowledge within the USOA that nonregulated activities, such as enhanced services, customer premises equipment sales, and installation and maintenance of inside wiring, are part of a telephone company's core business. Revenues from such activities fall within the ambit of "operating revenues" as that term is widely used in the financial community. We therefore adopt the suggestion of Southwestern Bell to establish a new account in the 5000 series to be used for the nonregulated revenues derived from activities which share assets or resources with regulated activities. We will designate this new account as Account 5280, Nonregulated Operating Revenue.[10]

2. ***Use of numerous accounts***

13. We do not agree with Bell Atlantic that nonregulated revenues should be spread among the various revenue accounts rather than segregated in a single account. There are forty-three regulated revenue accounts arranged in five major groups: Local network service revenues, Network access service revenues, Long distance network access service revenues, Miscellaneous revenues, and Uncollectible revenues. Bell Atlantic states that it would record nonregulated revenues in these accounts "according to their

functional nature, consistent with the requirements of Part 32, instead of all in one account."[11] Upon surface examination, Bell Atlantic's approach may appear reasonable for an enhanced service like asynchronous-X.25 protocol conversion, which has a close functional relationship to a regulated service, *i. e.* basic packet switching. There are, however, many types of nonregulated activities, for example information services or installation and maintenance of inside wiring, that do not fit so readily within the account structure we have established for regulated service revenues. Furthermore, we have no regulatory need for service-specific revenue data for nonregulated activities.[12] Our regulatory purposes are satisfied by using a single account for this purpose. Carriers which desire more detailed categorization of nonregulated revenues can use subaccounts within that account, as U S West suggests.

3. Use of service order codes to split customer billings

14. Finally, we do not permit Bell Atlantic or others to divide customer billings between regulated and nonregulated revenue accounts in the manner described in its petition.[13] Bell Atlantic's method will not produce correct results for all nonregulated activities. It cannot be used, for example, for an activity in which the carrier uses tariffed business dial tone lines to connect dedicated enhanced service equipment to the network in such a way that enhanced service customers may access the enhanced service through their telephones.[14] The reason Bell Atlantic's method will not work in such a case is that the price of the tariffed services which the carrier uses in providing the enhanced service does not vary directly with the volume of incoming calls from enhanced service customers or with the quantity of enhanced service that is purchased. Hence, the amount of the tariffed service to be attributed to an individual enhanced services customer could not be determined at the time of billing, and the customer's bill could not be split between regulated and nonregulated accounts. Moreover, if no enhanced services were purchased by customers, Bell Atlantic would apparently record no credit for regulated revenues, even though tariffed services had in fact been provided to the nonregulated activity for use in offering the enhanced service.

15. Under our prescribed method, all amounts billed for nonregulated products and services are credited to a nonregulated revenue account. The amounts which the carrier, in effect, pays to itself for tariffed services which it has obtained for use in the provision of nonregulated products and services are credited to the appropriate regulated revenue accounts. The amounts credited as regulated revenues are also debited to the nonregulated revenue account. This method produces both a correct division of regulated and nonregulated revenues and a correct accounting of total revenues,[15] regardless of the manner in which the tariffed service is used by the nonregulated activity. We therefore retain the prescribed method.

III. THE NYDPS PETITION

A. *Background*

16. In the *Joint Cost Order*, we required carriers to allocate those common cost categories which contain investment in central office equipment and outside plant on the basis of "relative regulated and nonregulated usage of the investment at the highest forecast relative nonregulated usage over the life of the investment."[16] We chose this forward-looking investment allocator to reflect network plant investment decisions, which are necessarily based on anticipated, rather than current, demand levels.[17] To prevent carriers from shifting to ratepayers the risk they incur in investing in nonregulated activities, we prohibited reallocation of investment from nonregulated activities to regulated services.[18] We stated that we would waive this prohibition only upon a showing that the regulated operation has need of additional capacity and that it cannot obtain that capacity elsewhere at lower cost.[19] To guard against underforecasting of nonregulated usage, we provided that any necessary reallocations from regulated to nonregulated operations should take place at undepreciated baseline cost plus an interest charge to reflect the time value of money. We defined "baseline cost" as either the depreciated original cost at the time of initial allocation or assignment of existing plant or the original cost of subsequently-acquired new plant.[20]

17. In the *Order on Reconsideration*, we affirmed the use of forward-looking investment allocators but found that the very long term forecasts we had originally intended to use for that purpose posed severe practical problems. We said:

> The longer the forecast period, the more likely that carriers will be engaged in guesswork to estimate usage trends. While we wish to require the correct allocation of investment risk, we should structure an allocation mechanism that relies less on fortune-telling and more on reasoned analyses. Furthermore, it is apparent that retaining "average depreciation life" as the general rule will lead to so great a variation in forecast periods used by carriers over time as to over complicate our monitoring of cost allocations and seriously compromise our ability to make benchmark comparisons among the companies.[21]

We therefore modified the cost allocation rules to allow carriers to use uniform forecast periods of three years for all categories of central office equipment and outside plant. We stated that a "detailed, specific and convincing showing" would be required to justify use of a period shorter than three years.[22]

B. *The NYDPS Petition*

18. In its petition for clarification and reconsideration, the NYDPS urges this Commission to return to our original requirement that central office equipment and outside plant be allocated based on forecasts of peak relative nonregulated usage over the life of the plant. NYDPS also requests clarification of our policies regarding reallocation of investment. Specifically, NYDPS asks us to clarify that no downward adjustments to nonregulated usage will be allowed, and that upward adjustments to nonregulated usage will be retroactive, with interest, to the time the plant was first forecast to be used for nonregulated operations.

19. In support of its position, NYDPS offers two scenarios which, it states, exemplify the abuses which may occur if allocation of common plant is based upon a three-year usage forecast. In the first scenario, new plant with a 15 year service life is initially forecast to be used 75% for nonregulated activities and 25% for regulated services. After the first three years, the nonregulated uses are aban-

doned due to unprofitability. The next three-year forecast then shows that 100% of the cost of this investment will be assigned to regulated services.

20. In its second scenario, NYDPS hypothesizes purchase of plant with a 15 year service life which, the carrier believes, will ultimately be used 60% for nonregulated activities and 40% for regulated services. Because it will take some time for service to reach those levels, however, the carrier forecasts 25% nonregulated usage during the initial three-year period. According to NYDPS's scenario, "the remaining 35% of nonregulated capacity is available but unused for the first three-year period and is borne by regulated services."[23] The nonregulated service grows, but not to the extent the carrier originally believed it would. The next three-year forecast is raised to 35%, and it remains there for the rest of the life of the equipment. According to NYDPS, "The other 25% of the original 60% nonregulated capacity is borne by the regulated services."[24] NYDPS states that in both of its scenarios, regulated operations would be burdened with investment in spare capacity initially intended for nonregulated use.

C. *Responsive pleadings*

21. The National Association of Regulatory Utility Commissioners (NARUC) states its support of the NYDPS petition in a resolution adopted by its Executive Committee on March 3, 1988, and submitted in this docket on March 7, 1988.[25]

22. In opposition to the petition, USTA argues that NYDPS raises no new issues that have not previously been addressed by this Commission; that the petition is predicated on a misunderstanding of the Commission's rules; and that the petition is inconsistent with the realities of network engineering. USTA states that the concern about reallocation of nonregulated investment, which is reflected in NYDPS's first example, is unfounded, since the *Order on Reconsideration* reaffirmed the rule that nonregulated investment will not be permitted to decrease. USTA argues that the second example given by NYDPS is predicated on an erroneous assumption, namely, that a company would deploy equipment long before its planned actual use. USTA states that capacity for increases in nonregulated demand beyond a three year period would be provided through new additions of plant rather than through a reallocation of spare capacity. USTA also notes that it is inappropriate to consider as "spare" any capacity actually used by regulated services.

23. Each of the carriers addressing the NYDPS petition echoes USTA's arguments. U S West, supported by Pacific, also argues that the NYDPS request for clarification of the reallocation restrictions "is trying to put a new twist on these rules." U S West states that, under the NYDPS interpretation, retroactive adjustments would go back to the very beginning of the first three-year forecasting period even if actual nonregulated usage did not exceed the forecast during that first period. U S West characterizes this interpretation as unfair and confiscatory. U S West states that the rules currently require that retroactive adjustments be made to the beginning of the three-year period for which the underforecast was made, and that NYDPS has given no compelling reason for deviation from this standard.

24. Southwestern Bell states that the second NYDPS hypothetical is based on one of two erroneous assumptions: (1) that forecasts used to allocate common network investment will differ from the forecasts used to place network plant; or (2) that forecasts used to allocate common network investment will systematically deviate from actual placement of plant. Southwestern Bell argues that there is no factual basis for either assumption; that the use of the same forecast for placing plant and for allocating costs can readily be verified; and that any systematic deviations of forecasts from actual plant placement will become apparent through this Commisssion's close monitoring of actual and forecast usage. AT&T argues that the increasing modularity of network plant means that network demand can be satisfied by installing plant on an "as needed" basis, rather than by installing extra plant capacity now to meet demand anticipated fifteen years from now. Bell Atlantic states that NYDPS is incorrect in including in its second scenario the assertion that nonregulated capacity intended for use beyond the three-year forecast period would all be allocated to regulated services. Under the current rules, any spare capacity would be allocated in the same proportion as the capacity in use.

D. *Reply*

25. Regarding its request for clarification of the restrictions on reallocation of investment, NYDPS states that it is pleased that all respondents interpret the rules as not allowing subsequent three-year forecasts to be lowered unless a waiver is granted. NYDPS still believes, however, that this Commission should formally clarify the reallocation rules so as to avoid any later confusion.

26. NYDPS defends its second scenario, arguing that it is entirely conceivable that new nonregulated services will fail or fall short of long-term expectations and that "regulated services [will] then undeniably bear additional risks and costs as a result of using three-year estimates rather than estimates over the life of the plant".[26] NYDPS states that AT&T's arguments concerning modularity are unrealistic and cannot logically be used to justify the use of three-year forecasts. According to NYDPS, the increasing modularity of network plant should allow companies to estimate even more accurately the use of plant over its entire life. Thus, in NYDPS's view, the use of smaller increments of investment tends to make even more reasonable the original approach taken in the *Joint Cost Order*. NYDPS states that, contrary to the claims of Bell Atlantic, the ratable allocation of spare capacity between regulated and nonregulated activities does not solve the problems posed in NYDPS's example. This is because the example posits that 100% of spare capacity is actually intended for nonregulated use, so that any allocation of spare capacity to regulated service would result in ratepayers bearing nonregulated costs.

27. NYDPS contends that the following questions remain to be answered regarding the current investment allocation rules: (1) Why should the regulated business be allocated any portion of unused capacity which might eventually be absorbed by the nonregulated business as it matures? (2) If nonregulated businesses can "slough off" the cost of unused capacity, why does this not unfairly disadvantage competitors of the nonregulated business? (3) How does the current allocation procedure protect the regulated business from risky nonregulated business failures? Is there not an incentive to present low initial forecasts for risky enterprises? (4) How do the current rules protect the regulated business from bearing the costs and risks of the nonregulated business? NYDPS states that

it does not find answers to these concerns in the *Order on Reconsideration* or in the responses to the NYDPS petition.

E. *Discussion*

28. NYDPS seeks (1) clarification of our restrictions on reallocation of investment from nonregulated to regulated use; (2) clarification of the manner in which necessary reallocations from regulated to nonregulated use will be made; and (3) reconsideration of our decision to use three-year forecasts for allocation of network plant. In this Order we provide a general clarification of the reallocation rules. For the reasons stated below, we deny NYDPS's request for reconsideration.

1. Reallocation of investment from nonregulated to regulated use.

29. The basic rule for reallocation of network plant investment from nonregulated to regulated use is simple: investments once allocated to nonregulated use may not be reallocated to regulated use.[27] This rule, which is intended to insure that investment risk incurred in nonregulated ventures is not shifted to the regulated side of the carrier's business, applies even if the nonregulated use of network plant decreases or, indeed, never materializes. The rule generally prohibits decreases in the amount of gross nonregulated plant investment in any cost category; it does not, however, prohibit downward adjustment of usage forecasts.

30. For example, assume that a local exchange carrier will have1 million of investment in a particular cost pool during 1989. Assume also that its three-year forecast covering the years 1989-1990-1991 indicates that the percentage of total usage represented by nonregulated usage for the plant in this cost pool will be 1% in 1989, 3% in 1990, and 5% in 1991. Five percent of the1 million in the cost pool (50,000) must be allocated to nonregulated activities in 1989. The remaining950,000 will be separated between the intrastate and interstate regulatory jurisdictions. The interstate portion will be included in the rate base for the access tariffs which are in effect during 1989. When the carrier prepares new access tariff rates for the year 1990, it will make a new three-year forecast for the years 1990-1991-1992. If the nonregulated service which uses the plant in the cost pool in question has been less successful than anticipated, the new forecast may show that only 1% of investment in the cost pool will be used for nonregulated activities in each of those years. The company must nevertheless continue in 1990, and in subsequent years, to allocate at least50,000 of the gross investment in the cost pool to nonregulated activities.

31. We will waive our prohibition on reallocation of investment from nonregulated to regulated use only upon a convincing showing that (1) the carrier's regulated activities require the use of plant capacity allocated to nonregulated activities, and (2) that the carrier cannot obtain the needed capacity elsewhere at lower cost.[28] Should such a reallocation be permitted, it will be made at depreciated baseline cost.[29]

2. Reallocation of investment from regulated to nonregulated activities

32. In the *Joint Cost Order* we said:

> We recognize that, given the long planning horizons of some investments, inevitably some underforecasting of nonregulated demand will occur. To protect ratepayers from such burdens, we will closely monitor actual and forecasted usage. If reallocations of telecommunications plant (i.e. central office equipment and outside plant) from regulated to nonregulated operations are required, such plant will be transferred at undepreciated baseline cost plus an interest charge to reflect the time value of money. The authorized interstate rate of return that is in effect for each relevant period will be used to compute the charge. The baseline cost will either be the depreciated original cost at the time of the original assignment or allocation of existing plant or the original cost of subsequently-acquired new plant.[30]

In the *Order on Reconsideration*, we rejected various carrier petitions for modification or elimination of this reallocation provision. We found that the major objections to the reallocation requirement focussed upon the difficulty of making accurate long-term forecasts. In this regard, we said:

> Because we have decided to reduce forecast periods to three years, carriers ought to be able to predict with a much greater degree of certainty the levels of regulated and nonregulated usage. We believe that the shorter forecast periods not only render moot the argument that it is somehow unfair to impose a remedy for underforecasting, but also make it much less likely that large-scale reallocations will ever become necessary.[31]

33. NYDPS is incorrect in its assumption that we intended to retain, even after we reduced the forecast period to three years, the requirement that all future reallocations be made retroactive to the first year in which a three-year forecast was made for a given cost pool. As noted by U S West and Pacific, reallocations will be retroactive to the year in which an underforecast was made. We will not, however, wait until we have received actual usage data for all three years of a forecast period before we require reallocations. Such an approach would mean that refunds to ratepayers made necessary by an underforecast incorporated into 1988 access tariffs could not be made until 1992.[32] Instead, reallocations will be made each year. for each previous three-year period for which actual usage data or a new forecast establishes a need for reallocation.

34. We expect that each year, as they develop the cost support for the next year's access tariffs, carriers will calculate the amounts of investment which they must retroactively reallocate to nonregulated activities. They will then adjust their proposed rates for the next year to effect a refund to ratepayers of the amounts overcharged in past years due to underforecasting. Instructions for including reallocation data in the cost support materials will be included in the Common Carrier Bureau's annual tariff review plan.

3. Use of three - year forecasts for network plant allocations

35. In the *Notice of Proposed Rule Making* [33] in this docket we sought comment on two alternative fully distributed costing methods. The first was patterned after

traditional methods such as those used in the Jurisdictional Separations Manual.[34] It would have required carriers to assign investment to homogeneous cost pools and then to allocate the costs in each pool in accordance with the current relative use of the investment. The second alternative would have required carriers to determine unit costs for each nonregulated service and to allocate costs to each service on the basis of a demand forecast for that service. The NPRM did not specify the period of time which those service-specific demand forecasts would have covered.

36. Many parties, including NYDPS, commented on these proposals. A great deal of comment centered upon the issues of investment risk allocation which NYDPS raises in the petition we are considering here.[35] After careful consideration of the comments, we became convinced that our proposal to allocate investment costs based on current relative use would not adequately assure that nonregulated activities would bear their full share of investment risk. The lag between investment and demand, coupled with the likelihood that new nonregulated network services would grow at a faster rate than established regulated services, meant that current investments intended for future use would always be misallocated. We also realized, however, that our forward-looking, service-specific proposal, while offering a way to handle the investment risk issue, was probably unworkable. We ultimately adopted an approach which combined the cost pool structure of the first alternative with the forward-looking concept of the second alternative.

37. In order to match the allocation of investment costs with the investment decisions which cause the costs to be incurred, we required carriers to allocate network plant investment based on forecasts of relative use during the investment planning period established for each cost pool. We stated that "a specific showing [would] have to be made to establish a forecast period that [was] shorter than the average depreciation life" of the plant in the cost pool.[36] We chose "average depreciation life" as the default planning period because it seemed logical to assume that companies might decide at the time they buy equipment what they will be using that equipment for during its entire investment life. There was, however, no evidence in the record that demonstrated conclusively that carriers did, or indeed could, predict the regulated and nonregulated uses of network plant many years into the future. Nor, on the other hand, did the record provide any basis for us to establish any specific, shorter forecast period. We anticipated that carriers would come forth with requests for permission to use shorter forecast periods for particular cost pools. In considering such requests, we would be able to develop further our understanding of the manner in which investment risk is incurred by telephone companies when they purchase plant that is to be used in common by regulated and nonregulated activities.

38. In petitions for reconsideration, carriers raised numerous objections to our choice of a forward-looking investment allocator. They argued that their actual planning periods for network investment were much shorter than the depreciation lives of the equipment; that it would be unreasonable to expect them to make accurate demand forecasts many years into the future; and that the increased modularity of the telecommunications network had greatly reduced the lag between investment and demand.[37] Other parties strongly defended our use of long-term forecasts, using the same arguments about spare capacity and investment risk allocation which NYDPS makes now.[38]

39. We could find in the petitions for reconsideration no reason to doubt our original conclusion that proper allocation of network plant between regulated and nonregulated uses requires a forward-looking allocator. We did, however, conclude that our use for this purpose of demand forecasts extending over the depreciation life of plant posed two serious practical problems. First, companies could not really predict with any accuracy what the relative regulated and nonregulated uses of plant would be in ten or twenty years. They would be making cost allocations based on guesswork. Second, use of average depreciation life as the forecast period would mean that carriers would start out using different forecast periods for the same types of plant. The variations would only multiply as companies sought waivers to use shorter planning periods for their forecasts. The resulting lack of uniformity would hamper our ability to monitor cost allocations and to use benchmark comparisons in analyzing cost allocation results. In light of these practical considerations, we decided to modify our rules to permit carriers to use uniform forecast periods of three years for all categories of central office equipment and outside plant.[39]

40. In its instant petition, NYDPS does not attempt to refute our finding that practical problems preclude use of very long term demand forecasts for the allocation of central office equipment and outside plant between regulated and nonregulated uses. It does not demonstrate that carriers in fact have significant amounts of spare capacity intended for use in the distant future. It does not show that we were mistaken in concluding that it is unreasonable to expect a carrier to be able to predict levels of nonregulated usage ten or twenty years from now. It offers no advice on how we would monitor and administer a system based on depreciation life forecasts. Its argument consists, in essence, of the observation that *if* a carrier has in place capacity which is not currently needed for any purpose, but which it will use for nonregulated activities four or more years hence, then the ratepayers are bearing a portion of the cost of that spare, nonregulated capacity.[40] The fact that this observation is, in its own terms, correct does not compel nor even permit us to return to the use of longer term forecasts in the absence of evidence that such forecasts would be meaningful or usable.

41. We do share the concerns expressed in the NYDPS pleadings and the NARUC resolution. Network-based nonregulated services are currently few and small, but we expect them to develop and grow under the *Computer III* regime of open network architecture and non-structural safeguards. Our monitoring program will enable us to determine very early in this developmental period whether or not our current approach is working. If, for example, a pattern develops in which capacity allocated to regulated use is consistently greater than can be accounted for by predictions of regulated demand, and capacity is continually being reallocated to nonregulated use, this Commission, as well as state commissions, may have to consider whether disallowances or other remedies are called for.

IV. PAPERWORK REDUCTION ACT

42. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval of the Office of Management and Budget as prescribed by the Act.

V. ORDERING CLAUSES

43. IT IS HEREBY ORDERED, that pursuant to §§4(i), 4(j), 201-205, 215, 218, 219, 220 and 405 of the Communications Act of 1934, 47 U.S.C.§§154 (i), 154(j), 201-205, 215, 218, 219, 220 and 405, the Petition of New York State Department of Public Service for Clarification and Reconsideration, filed in this proceeding on November 13, 1987, and the Bell Atlantic Petition for Reconsideration, filed in this proceeding on November 23, 1987, ARE DENIED IN PART and GRANTED IN PART as specified herein.

44. IT IS FURTHER ORDERED, that pursuant to §§4(i), 4(j), 201-205, 215, 218, 219, and 220 of the Communications Act of 1934, 47 U.S.C.§§154 (i), 154(j), 201-205, 215, 218, 219 and 220, the amendments to Part 32 of this Commissions Rules and Regulations contained in Appendix A of this document ARE ADOPTED effective **May 22, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 32 Uniform System of Accounts for Telecommunications Companies is amended as follows:

1. The index to Part 32 is amended to delete Section 32.7991 and to add Section 32.5280 to read as follows:

PART 32 - UNIFORM SYSTEM OF ACCOUNTS FOR TELECOMMUNICATIONS COMPANIES

* * * * *

Subpart D - Instructions for Revenue Accounts

* * * * *

32.5270 Carrier billing and collection revenue.
32.5280 Nonregulated operating revenue.
32.5300 Uncollectible revenue.

* * * * *

Subpart F - Instructions for Other Income Accounts

* * * * *

32.7990 Nonregulated net income.

Subpart G - Glossary

* * * * *

2. Section 32.14 is amended by revising paragraph (c) to read as follows:

§ 32.14 Regulated Accounts.

* * * * *

(c) In the application of detailed accounting requirements contained in this Part, when a regulated activity involves the common or joint use of assets and resources in the provision of regulated and nonregulated products and services, companies shall account for these activities within the accounts prescribed in this system for telephone company operations. Assets and expenses shall be subdivided in subsidiary records among amounts solely assignable to nonregulated activities, amounts solely assignable to regulated activities, and amounts related to assets used and expenses incurred jointly or in common, which will be allocated between regulated and nonregulated activities. Companies shall submit reports identifying regulated and nonregulated amounts in the manner and at the times prescribed by this Commission. Nonregulated revenue items not qualifying for incidental treatment, as provided in Section 32.4999(l), shall be recorded in Account 5280, Nonregulated operating revenue.

3. Section 32.23 is amended by revising paragraph (c) to read as follows:

§ 32.23 Nonregulated activities.

* * * * *

(c) When a nonregulated activity does involve the common or joint use of assets and resources in the provision of regulated and nonregulated products and services, carriers shall account for these activities within accounts prescribed in this system for telephone company operations. Assets and expenses shall be subdivided in subsidiary records among amounts solely assignable to nonregulated activities, amounts solely assignable to regulated activities, and amounts related to assets and expenses incurred jointly or in common, which will be allocated between regulated and nonregulated activities. Carriers shall submit reports identifying regulated and nonregulated amounts in the manner and at the times prescribed by this Commission. Nonregulated revenue items not qualifying for incidental treatment, as provided in Section 32.4999(l), shall be recorded in separate subsidiary record categories of Account 5280, Nonregulated operating revenue. Amounts assigned or allocated to regulated products or services shall be subject to Part 36 of this Chapter.

4. Section 32.1220 is amended by revising paragraph (i) to read as follows:

§32.1220 Inventories.

* * * * *

(i) 1220.2 Property held for sale or lease. This subaccount shall include the cost of all items purchased for resale or lease. The cost shall include applicable transportation charges, sales and use taxes, and cash and other purchase discounts. Inventory shortage and overage shall be charged and credited, respectively, to Account 5280, Nonregulated operating revenue.

5. Section 32.4999 is amended by adding a new paragraph (l) and by revising paragraphs (l) and (m) to add Account 5280 to the list of revenue accounts to be maintained as follows:

§ 32.4999 General.

* * * * *

(l) Nonregulated revenues. The nonregulated revenue account shall be used for nonregulated operating revenues when a nonregulated activity involves the common or joint use of assets or resources in the provision of regulated and nonregulated products or services and when such activity is accounted for, as required in §32.23(c) of this subpart, within the accounts prescribed in this system for telephone company operations. Revenues from nontariffed activities offered incidental to tariffed services may be accounted for as regulated revenues, provided the activities are outgrowths of regulated operations and the revenues do not exceed, in the aggregate, one percent of total revenues for three consecutive years. Such activities must be listed in the Commission-approved Cost Allocation Manual for any company required to file a Cost Allocation Manual.

(m) Uncollectible revenues. Uncollectible revenues shall include amounts originally credited to the revenue accounts which have proved impracticable of collection.

(n) Revenue accounts to be maintained.

Account title	Class A account	Class B account
* * * * *	* * *	* * *
Miscellaneous Revenues:		
* * * * *	* * *	* * *
Carrier billing and collection revenue	5270	
Nonregulated Revenues:		
Nonregulated operating revenue	5280	5280
Uncollectible Revenues:		
* * * * *	* * *	* * *

6. Section 32.5280 is added to read as follows:

§ 32.5280 Nonregulated operating revenue.

(a) This account shall include revenues derived from a nonregulated activity involving the common or joint use of assets or resources in the provision of regulated and nonregulated products or services, which are not provided for elsewhere in this system of accounts.

(b) This account shall be debited and regulated revenue accounts shall be credited at tariffed rates when tariffed services are provided to nonregulated activities that are accounted for as prescribed in §32.23(c) of this subpart.

(c) Separate subsidiary record categories shall be maintained for each nonregulated revenue item recorded in this account.

7. Section 32.6999 is amended by revising paragraph (b) to delete the listing of Account 7991 as follows:

§ 32.6999 General.

* * * * *

(b) Other Income Account Listing.

Account title	Class A account	Class B account
* * * * *	* * *	* * *
Jurisdictional Differences and nonregulated income items:		
* * * * *	* * *	* * *
Nonregulated net income	7990	7990

8. Section 32.7991 is removed in its entirety.

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*).

[2] The petitions for reconsideration were filed November 13 (NYDPS) and November 23 (Bell Atlantic). Pleadings responsive to one or both petitions for reconsideration were filed January 7, 1988 by American Telephone and Telegraph Company (AT&T); the Ameritech Operating Companies (Ameritech); Bell Atlantic; BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth); New England Telephone and New York Telephone Company (NYNEX); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (collectively, U S West)(two separate pleadings); Southwestern Bell Telephone Company (Southwestern Bell); and the United States Telephone Association (USTA). Replies were filed January 22 by Bell Atlantic and NYDPS. Pacific Bell and Nevada Bell filed a Reply on January 21.

[3] 47 CFR § 64.901 (b)(1).

[4] *Order on Reconsideration*, 2 FCC Rcd at 6307.

[5] 47 CFR §§ 32.7991(b), (c).

[6] In support of this assertion, Bell Atlantic cites Financial Accounting Standards Board, Accounting Standards Original Pronouncements, Statement of Financial Accounting Concepts No. 6, Elements of Financial Statements, para. 86, p.4176 (1986).

[7] By "operating revenue accounts" Bell Atlantic apparently means accounts 5000 - 5302. *See* Part 32 of the Commission's Rules, the Uniform System of Accounts for Telecommunications Companies (USOA), 47 CFR §§ 32.1 *et. seq.*

[8] Bell Atlantic Petition at 3, n.10.

[9] *Joint Cost Order*, 2 FCC Rcd at 1337 (emphasis added by Bell Atlantic).

[10] *See* Appendix A. In addition to creating the new account and deleting Account 7991, we also make conforming revisions to various other sections of the USOA. In response to Ameritech's argument that the 5000 series of accounts properly contains only regulated revenues, we amend §32.4999, the general instructions for the revenue accounts, to include instructions for the use of Account 5280. Moreover, we direct the Common Carrier Bureau to make any changes to the Automated Reporting Management Information System (ARMIS) reporting forms which are necessary to reflect the changes we adopt herein.

[11] Bell Atlantic Reply at 3, n.8.

[12] This Commission monitors each carrier's application of its cost allocation manual through the ARMIS. While it is essential to our monitoring program that we collect information on the revenues derived from nonregulated activities which receive allocations of cost in accordance with the cost manuals, we are interested only in the aggregate revenues for all such nonregulated activities. Indeed, Bell Atlantic's plan would complicate our efforts to collect revenue information, since we would have to require carriers to report both regulated and nonregulated amounts for each of many revenue accounts.

[13] *See* ¶ 4, *supra*.

[14] We recently granted Bell Atlantic conditional approval of a comparably efficient interconnection (CEI) plan for a message storage service which is provided in this fashion. *See The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Enhanced Service Providers*, 3 FCC Rcd 1108 (1988).

[15] The debit to nonregulated revenues is necessary in order to prevent overstatement of total company revenues.

[16] *Joint Cost Order*, 2 FCC Rcd at 1343 (former version of § 64.901 of the Commission's Rules).

[17] *Id.* at 1319.

[18] *Id.* at 1320.

[19] *Id.* at 1353, n.284.

[20] *Id.* at 1320.

[21] *Order on Reconsideration*, 2 FCC Rcd at 6288.

[22] *Id.*

[23] NYDPS Petition at 3.

[24] *Id.*

[25] We take official notice of the NARUC resolution, which it submitted in this proceeding and served on all of the parties after the close of the pleading cycle.

[26] NYDPS Reply at 4.

[27] *Joint Cost Order*, 2 FCC Rcd at 1321; *Order on Reconsideration*, 2 FCC Rcd at 6291.

[28] *Joint Cost Order*, 2 FCC Rcd at 1320 & n.284.

[29] *Id.* at 1320.

[30] *Id.*

[31] *Order on Reconsideration*, 2 FCC Rcd at 6291.

[32] The rates carriers are charging in 1988 were determined with reference to forecasts of the ratio of nonregulated use to total use at the point during the period 1988-1989-1990 when that ratio was expected to be the greatest. Where that point occurred, and what the ratio of nonregulated use to total use actually was at that point, will not be known until 1991, when actual usage data for the year 1990 become available. By the time the actual usage data are available, it will be too late to incorporate the data into the determination of access rates for 1991; any refunds made necessary due to underforecasting would have to be incorporated into access tariff rates for 1992.

[33] Separation of costs of regulated telephone service from costs of nonregulated activities, 104 FCC 2d 59 (1986)*(NPRM)*.

[34] 47 C.F.R. §§36.1 *et seq.*

[35] *See Joint Cost Order*, 2 FCC Rcd at 1314-1316.

[36] *Id.* at 1320.

[37] *Order on Reconsideration*, 2 FCC Rcd at 6285-6286.

[38] *Id.* at 6286-6287.

[39] *Id.* at 6288. We stated that a detailed, specific, and convincing showing would be required to justify a shorter forecast period. Specifically, the carrier would have to show (1) that the relevant planning period was less than three years; (2) that the planning and deployment process was not merely the activation of capacity that was already in place but not in service; (3) that the use of the shorter forecast period would result in substantially more accurate forecasts and therefore more accurate cost allocations; and (4) that the overall costs of implementing the shorter forecast period did not exceed the benefits. *Id.* This is, by intention, a very stringent set of waiver criteria. We view it as highly unlikely that the benefits to the public interest of allowing a carrier to use a shorter forecast period could be so great as to outweigh the cost to our regulatory program of monitoring forecasts for periods of varying lengths.

[40] As pointed out by Bell Atlantic, the ratepayers would not bear all of the cost of this hypothetical spare capacity. It would be borne by regulated and nonregulated activities in accordance with the current three-year forecast.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of	
DLBS INCORPORATED	File No. BPCT-840920KJ
Montgomery County Media Network, Inc. *et al.* d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY	File No. BPCT-841129KK
CONROE BROADCASTING, LIMITED PARTNERSHIP	File No. BPCT-841129KV
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G - A COMMUNICATIONS, INC.	File No. BPCT-841129LE
For Construction Permit Conroe, Texas	

Appearances

George R. Borsari, Jr., and *Howard W. Simcox, Jr.*, on behalf of DLBS Incorporated; *James L. Oyster*, on behalf of Montgomery County Media Network, Inc. *et al.* d/b/a Imagists; *Ann C. Farhat*, on behalf of Carmen Matias and Andrew N. Wimbish, Jointly; *Richard J. Bodorff, David D. Oxenford, Janet M. Evans, Carroll John Yung*, and *Susan E. Borke*, on behalf of Conroe Broadcasting, Limited Partnership; *Howard G. Slavit*, and *Philip V. Jackmauh*, on behalf of Wood Broadcasting Company; and *Donald E. Martin*, on behalf of G-A Communications, Inc.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: November 8, 1988; Released: November 17, 1988

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications for a new television station in Conroe, Texas, filed by Conroe Broadcasting (Conroe), Wood Broadcasting Company (Wood), DLBS Incorporated (DLBS), Carmen Matias and Andrew N. Wimbish, Jointly (M&W), Montgomery County Media Network, Inc. *et al.* d/b/a Imagists (Imagists), and G-A Communications, Inc. (G-A). The *Designation Order*, MM-0791, released November 13, 1985, specified the following issues for hearing:

> 1. To determine whether the applications of G-A Communications, Inc. and Carmen Matias and Andrew N. Wimbish, Jointly are consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the Rule.
>
> 2. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Memorandum Opinion & Order*, FCC 86M-1254 (released April 10, 1986), the following issue was added against Wood:

> To determine whether Wood Broadcasting Company is financially qualified to construct and operate its proposed television station in Conroe, Texas.

3. Issue 1 was resolved in G-A's favor pursuant to summary decision. *Order*, FCC 86M-1780 (released May 27, 1986). Issue 2 was resolved in favor of DLBS, Conroe Broadcasting, and Imagists pursuant to summary decision. *Order*, FCC 86M-1446 (released April 29, 1986) (DLBS); *Order*, FCC 86M-1257 (released April 10, 1986) (Conroe Broadcasting); *Order*, FCC 86M-798 (released March 3, 1986) (Imagists).

4. Hearing sessions were held during the period May 13-19, 1986. The record in this proceeding was closed on May 19, 1986. *Order*, FCC 86M-1781 (released May 27, 1986).

5. Subsequent to the filing of Proposed Findings of Fact and Conclusions of Law by the parties, the Presiding Judge designated additional issues to be tried in this proceeding. In response to a Motion to Enlarge Issued filed by Conroe Broadcasting, Limited Partnership, the Presiding Judge added the following issue by way of a *Memorandum Opinion and Order*, FCC 87M-344, released February 18, 1987:

a) To determine whether G-A has failed to disclose a real party-in-interest to its application.

b) To determine the effect of the evidence adduced under (a) above on the basic qualifications of G-A to be a Commission licensee.

6. By *Memorandum Opinion and Order*, FCC 87M-2010, released August 25, 1987, a comparative coverage issue was added:

To determine the areas and populations which would receive television service of 64 dBu (Grade B) or greater intensity, together with the availability of other Grade B television services in such areas, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. A hearing conference was convened on September 21, 1987. Further hearing sessions were conducted on December 1, 1987 and May 2, 1988. The record was closed on May 2, 1988. Tr. 1557; *Order*, FCC 88M-1398, released May 11, 1988.

II. FINDINGS OF FACT

A. DLBS Incorporated

8. DLBS is a nonprofit Texas corporation. Its structure is as follows:

Name	Position	Ownership Interest
Dr. John Schwarzwalder	President Director	33 1/3%
William T. Davis, Jr.	Vice President Director	33 1/13%
Donald E. LeBlanc	Secretary-Treasurer Director	33 1/3%

9. DLBS' Articles of Incorporation were executed June 7, 1984. Tr. 29. The Articles of Incorporation provide that the Corporation shall be managed by a board of directors consisting of not less than three and not more than 15 directors. Tr. 29. The Articles and Bylaws also provide that the board may increase its number as needs arise. Tr. 42. On July 21, 1984, at the first board of directors meeting, it was agreed that the number of directors would be limited to no less than three and no more than seven members. Tr. 31-32. Mr. Schwarzwalder testified that the limit on board members was lowered from 15 to seven because 15 would probably be more people than the original members would want to deal with. Tr. 47.

10. Dr. John Schwarzwalder, President and a Director of DLBS, proposes to serve as full time (40 hours per week minimum) General Manger of the station. As General Manager, he proposes to bear primary supervisory responsibility for all day-to-day station operations. He will also be responsible for establishing and implementing procedures designed to ensure compliance with all applicable FCC rules. DLBS Ex. 2, p. 1.

11. Dr. Schwarzwalder currently resides in Austin, Texas, which is not within the Grade B contour of the proposed facility. He proposes to move to Conroe if DLBS is granted a construction permit. *Id.*

12. Dr. Schwarzwalder is currently self-employed as a consultant in the areas of education, television, radio, and cable television. From 1978 to 1985, Dr. Schwarzwalder was Executive Consultant to the Twin City Area Educational Television Corporation. *Id.* During that same period, he was the manager of the Denton (Texas) Channel Two Foundation. DLBS Ex. 2, pp. 1-2; Tr. 50.

13. From 1976-1978 he was Station Manager of KOKH-TV in Oklahoma City, Oklahoma. DLBS Ex. 2, p. 2. Dr. Schwarzwalder was Executive Vice President and General Manager of Twin City Area Educational Television Corporation in Minnesota from 1956 to 1976. From 1948 to 1956 he was Assistant Professor, Associate Professor, then Professor and Chairman of the Radio-Television Department at the University of Houston. *Id.* Dr. Schwarzwalder is not a member of any civic groups in Conroe or Houston. Tr. 56.

14. William T. Davis, Jr., Vice President and a Director of DLBS, proposes to be employed as the full time (minimum 40 hours per week) Director of Engineering at the station. He will bear primary supervisory responsibility for construction and technical operation of the proposed station. DLBS Ex. 3, 1.

15. Mr. Davis currently resides in Houston, Texas. His residence is not within the Grade B contour of the proposed station. *Id.*; Tr. 71.

16. Mr. Davis is employed by AMF Geo Space Corporation. In 1983 he served as an engineering consultant for the Central Virginia Educational Television Association. From 1982 to 1984, Mr. Davis was a Sales Manager for OYO Instruments, Inc. Tr. 76. From 1964 to 1967, Mr. Davis was Director of Engineering at Taft Broadcasting. Tr. 64. Mr. Davis was also responsible for installation and maintenance of most of the television and audio systems at NASA Manned Spacecraft Center in Houston during that period. In addition, Mr. Davis was also responsible for installation and service of an ITV system for Spring Branch School District in Houston. From 1950 to 1956, Mr. Davis was Director of Engineering at the University of Houston. DLBS Ex. 3, p. 2. Prior to that time, he was Chief Engineer at KLVT-AM, Levelland, Texas.

17. Donald E. LeBlanc, Secretary-Treasurer and a Director of DLBS, proposes to serve as full time (minimum 40 hours per week) Program Director and Sales Manager at the station. DLBS Ex. 4, p. 1. Mr. LeBlanc will bear supervisory responsibility for program acquisition and production, and will be responsible for selecting and supervising the sales staff.

18. DLBS' Integration Statement, filed January 29, 1986, reads: "Mr. LeBlanc will be program director of the proposed facility . . . . Mr. LeBlanc will bear supervisory responsibility for program acquisition and production." Tr. 37. Mr. LeBlanc testified that he did not think the integration statement had been corrected to indicate that he intended to be both Program Director and Sales Manager.

19. Mr. LeBlanc testified that DLBS will expand its Board of Directors; however, no time frame for expansion has been set. He stated that prior to the first broadcast date he expected that the need for community support and input would require an expansion of the Board. Tr. 41-42.

20. Mr. LeBlanc's current residence in Houston is not within the Grade B contour of the proposed facility. DLBS Ex. 4, p. 1. Mr. LeBlanc does not plan to move into the grade B contour if DLBS is awarded a construction permit. Tr. 37.

21. Mr. LeBlanc is currently self-employed as a free lance announcer and narrator. Tr. 38. Until his termination in 1985, Mr. LeBlanc was an account executive at Warner Amex Cable in Houston. Tr. 39. From 1970 to 1980 he was a local sales manager at KHTV. DLBS Ex. 4, p. 1. Mr. LeBlanc held three positions at KODA AM/FM in Houston from 1959 to 1968. He was an on-air personality from 1959 to 1963, program director from 1963 to 1966, and sales representative from 1966 to 1968. DLBS Ex. 4, p. 1. Prior to his employment at KODA, Mr. LeBlanc was an on-air personality at KTRH-AM in Houston.

22. Mr. Davis testified that by letter of January 23, 1986, Messrs. LeBlanc, Schwarzwalder, and Davis confirmed previous discussions that each would be responsible for one-third (33 1/3 percent) of all expenses incurred on behalf of DLBS. Tr. 73-74.

23. John Schwarzwalder is one of 23 directors of Capital Broadcasting Association, licensee of non-commercial station KMFA(FM), Austin, Texas (Tr. 51). The directors meet quarterly (Tr. 53). They oversee KMFA operations and finances, set salaries, make decisions regarding programming time, and discuss the hiring and firing of employees (Tr. 53).

24. Neither DLBS, Inc. nor its principals, Davis, LeBlanc, or Schwarzwalder, has any other interest in any medium of mass communications. DLBS Ex. 1, p. 1.

B. Imagists

25. Montgomery County Media Network, Inc., *et al.*, d/b/a/ Imagists, is a Texas limited partnership. The general partner is Montgomery County Media Network, Inc. (Montgomery), a Texas corporation. Imagists Ex. 1, p. 1. It was stipulated at hearing that as of the B Cut-off date, Montgomery was structured as follows:

Name	Position	Ownership Interest
Frank Garza	President	33 1/3%
Dr. Rhonda Saldivar	Secretary	33 1/3%
Alan William Rossing	Vice President	33 1/3%

Tr. 84. Subsequent to the B Cut-off, Dr. Saldivar and Mr. Rossing each came to own a 50 percent share in Imagists. The minutes of Montgomery's Board of Directors meeting of December 13, 1985 show that Imagists' President, Frank Garza, tendered his resignation. CBLP Ex. 2; Tr. 100. Dr. Saldivar assumed Mr. Garza's position as President, and Mr. Rossing assumed Dr. Saldivar's position as Secretary at the December 13, 1985 meeting. The resulting structure of Montgomery is as follows:

Name	Position	Ownership Interest
Dr. Rhonda Saldivar	President	50%
Alan William Rossing	Vice President	50%
	Secretary	

Imagists Ex. 1, p. 1.

26. Montgomery's Articles of Incorporation were filed November 8, 1984. Wood Ex. 1A. Dr. Charles Johnson was Montgomery's initial Director. Wood Ex. 1A, p. 2; Tr. 108.

27. The limited partner of Imagists is Humanity Interested Services, Inc. (HIS), a non-profit tax exempt Texas corporation. Imagists Ex. 1, p. 1. HIS operates a school in Conroe, grades K-12. *Id.* Dr. Charles Johnson is Executive Director of HIS. Tr. 90-91. David Johnson is Secretary of HIS. Dowen Johnson is Vice President of HIS. Tr. 114. David and Charles Johnson are brothers. Dowen is a nephew of David Johnson. Tr. 115.

28. The capital contributions made to the partnership are as follows:

Name	Cash	Property
Montgomery	1,000.00	- 0 -
HIS	- 0 -	10,000.00

Conroe Ex. 3. Dr. Saldivar and Mr. Rossing testified that they are each obligated to contribute500 which will comprise Montgomery's 1,000 capital contribution to the partnership. Neither Dr. Saldivar nor Mr. Rossing have actually paid any of this money thus far. Nor have they made contributions toward the costs of Imagists' application. Tr. 108, 140. Neither Mr. Rossing nor Dr. Saldivar has signed a stock subscription agreement. Tr. 109, 140-141.

29. The shares of profits or other income accruing to the partnership are as follows:

Name	Share of Profits
Montgomery	1%
HIS	99%

Conroe Ex. 4.

30. Dr. Rhonda Hill Saldivar proposes to serve as the full time (minimum 40 hours per week) Program Director of the station. Imagists Ex. 2, 1. Dr. Saldivar will be chairman of the program advisory committee, will interview prospective employees, and make recommendations to the General Manager regarding the hiring of staff. Dr. Saldivar is a black female.

31. Dr. Saldivar currently resides in Houston, Texas, within the Grade B contour of the proposed station. There is no record evidence which shows the length of that residence.

32. Since September, 1985, Dr. Saldivar has been employed at Texas Southern University as an Assistant Professor in the English Department. Imagists Ex. 2. Dr. Saldivar was a reference librarian at the Houston Public Library from 1984 to 1985. She was a freshman English instructor at Houston Community College from 1982 to 1983. She was an English teacher at Jersey Village High School in Jersey Village, Texas, from 1981 to 1982. Between 1979 and 1980, Dr. Saldivar taught English at Jarvis Christian College in Hawkins, Texas. Imagists Ex. 2, p. 3. Dr. Saldivar also taught English at Jarvis from June to August, 1977.

33. Dr. Saldivar testified that she became aware of the availability of a channel in Conroe through David Johnson, a member of HIS, while she was teaching at Southern Bible College. (January 1984 to May 1984). Tr. 86; Imagists Ex. 2. David Johnson invited Dr. Saldivar to become a member of HIS. Tr. 88. Through David Johnson, Dr. Saldivar became acquainted with Charles Johnson, Executive Director of HIS. Tr. 90-91. Following a telephone conference with David Johnson in which he asked Dr. Saldivar to participate in the Conroe application, members

of HIS met with Dr. Saldivar to discuss the application. Tr. 89-90. At that first meeting, the relationship between HIS, Montgomery and Imagists was explained to Dr. Saldivar. Tr. 91. According to Dr. Saldivar, the idea to form a limited partnership was Dr. Charles Johnson's. Tr. 121. Dr. Salvidar had no role in preparing Imagists' application, and she does not know who did prepare that application (Tr. 92).

34. In its application, Imagists lists its address as "200 Avenue J, Conroe, Texas." HIS has offices at that address and operates the Christian Montessori School on that property. Tr. 93-94, 136.

35. The Certificate of Limited Partnership of Imagists lists its general partner, Montgomery, as having a principal place of business at P.O. Box 42, Conroe, Texas, 77305. Dr. Saldivar, the President of Montgomery, testified that P.O. Box 42 belongs jointly to Montgomery and HIS. Tr. 95. However, Dr. Saldivar does not have a key to that post office box. She testified that Charles Johnson has the key. Tr. 96.

36. Thus far, all of Imagists' legal and engineering fees have been paid by HIS (Tr. 112). Dr. Saldivar has not contributed any money toward Imagists' application thus far. Tr. 108. She has not signed a stock subscription agreement. Tr. 109.

37. Alan William Rossing proposes to serve as full time (minimum 40 hours per week) General Manager/Sales Manager of the station. In this position he will be principally responsible for the day-to-day operation of the station and for management of the sales staff (Imagists Ex. 1). Mr. Rossing currently resides in Conroe, Texas, and has resided there since approximately 1984. Mr. Rossing is an American Indian (Imagists Ex. 1).

38. Mr. Rossing is currently employed by Atlas Single-Ply Inc., a commercial industrial roofing company. Tr. 154-155. Prior to his employment at Atlas and beginning in July 1985, Mr. Rossing worked for L & R Personnel, Inc., as an assistant manager, bartender, and waiter at the Tejas Cafe and Bar in Conroe. Imagists Ex. 1, p. 3. From April 1985 until his employment at Atlas, Mr. Rossing was the co-owner and operator of Curtsinger-Rossing, Inc. d/b/a/ "Old Conroe Deli and Catering." From September 1984 to March 1985, Mr. Rossing was the manager of Conroe City Gulf. He was employed by Ewing Tex Corporation, an industrial roofing company, from 1983 to 1984 as a general sales manager and supervisor. From 1982 to 1983, Mr. Rossing was the food and beverage director at the Texas River Plantation Country Club in Conroe. Mr. Rossing has not claimed civic participation in Conroe.

39. In the Summer of 1984, Mr. Rossing became aware of the availability of a channel at Conroe through Charles Johnson. Tr. 132. Mr. Rossing testified that during their first conversation, Mr. Johnson asked him to be on the board of directors of an applicant for Conroe. *Id.*

40. Mr. Rossing was not involved in the selection of Imagists' communications counsel. Tr. 135. He testified that Frank Garza and Charles Johnson made that selection. To Mr. Rossing's knowledge, Messrs. Johnson and Garza selected Imagists' engineer. He does not know who selected the applicant's FAA consultant.

41. According to Mr. Rossing, he first discussed the form of the applicant with Charles Johnson and Frank Garza in November 1984. Tr. 133-134. The idea for forming a limited partnership originated with Frank Garza and Charles Johnson. Tr. 134.

42. Mr. Rossing has never met Mr. Garza. Tr. 147. At the time Imagists' application was filed, Mr. Rossing had not spoken with Mr. Garza or Dr. Saldivar. Tr. 149. Dr. Saldivar and Mr. Rossing first met in December 1985, over a year after the application had been filed. Tr. 138. At the December 13, 1985 meeting, Mr.Rossing first learned from Charles Johnson that Mr. Garza had resigned. Tr. 139, 156. Mr. Garza offered his resignation on August 31, 1985. Tr. 156-157, 164.

43. When Charles Johnson first approached Mr. Rossing about becoming a member of the applicant, there was no discussion of Mr. Rossing's future role at the proposed station. Mr. Rossing agreed to help out in whatever way Charles Johnson saw fit. Tr. 164. Mr.Rossing testified that either Charles Johnson or Frank Garza chose him as Vice President of Montgomery in the latter part of 1984. Tr. 159. Mr. Rossing did not learn that he was chosen for this position until the latter part of 1985, approximately a year after having been selected.

44. Mr. Rossing testified that all financial responsibilities of the partnership would be borne by HIS. Tr. 140. Mr. Rossing testified that Montgomery has no bank account and that he does not know whether Imagists has a bank account. Mr. Rossing has pledged500 to Montgomery. He will be obligated to contribute the money if Imagists receives a grant of construction permit. Mr. Rossing has not contributed any money toward Imagists' application thus far. Tr. 140. Mr. Rossing does not know the extent of Montgomery's potential liabilities. Tr. 158. To his knowledge, possible liabilities of Montgomery have not been discussed. Mr. Rossing testified that he does not know how any additional funding beyond HIS' initial10,000 will be treated. Tr. 144-145. Mr. Rossing stated that an antenna site has been located; he does not know the location of the studio site. Tr. 145-146.

45. Mr. Charles Johnson testified that he is Pastor of Evangelistic Temple of Conroe. Tr. 171. He stated that one of the attorneys on the HIS Board of Directors drafted the Articles of Incorporation for Montgomery. Tr. 172.

46. Mr. Johnson has the key to P.O. Box 42 (actually 421) in Conroe. Tr. 176-177. Imagists' mail is delivered to 200 Avenue J, Conroe, Texas. Tr. 177. Mr. Johnson testified that whenever mail was of a nature that Imagists needed to receive, he would deliver it to Imagists. Tr. 178.

C. Matias and Wimbish

47. Section 73.610 (short-spacing) and air hazard issues were designated against Matias and Wimbish in the *Hearing Designation Order*. On April 14, 1988, Matias and Wimbish submitted a petition for leave to specify a new, properly spaced site. In this amendment, Matias and Wimbish specified a tower height of 1150 feet. Matias and Wimbish indicated, in a supplement to the petition for leave to amend filed April 17, 1986, that another applicant herein, Wood, had proposed the same site, and that FAA approval had been issued to Wood. Matias and Wimbish indicated its belief that it, too, would soon obtain FAA approval (Tr. 390-391). This amendment was accepted at hearing; however, Matias and Wimbish subsequently learned that in fact Wood had never obtained FAA ap-

proval for its 1150 foot proposal; rather, a substantial height reduction was required, as the proposed tower is in the flight path of an international airport (Tr. 293).

48. Matias and Wimbish's May 14, 1986, amendment, to lower the tower height, was rejected. *Memorandum Opinion and Order*, FCC 86M-2184 (released July 8, 1986). Noting that the May 14, 1986, amendment was required only because of "careless and erroneous reliance on what it unjustifiably believed to be the proposal of a competitor," it was ruled that Matias and Wimbish had failed to demonstrate good cause for acceptance of the amendment. In a further *Order*, FCC 86M-2183 (released July 8, 1986), the Presiding Judge denied Matias & Wimbish's May 14, 1986, Motion for Partial Summary Decision, where Matias & Wimbish had sought summary decision of the Section 77.610 (short-spacing) and air hazard issues.

49. Carmen Matias and Andrew N. Wimbish, Jointly, is a general partnership. Matias/Wimbish Ex. 1, p. 1; Tr.311. The partnership is structured as follows:

Name	Position	Ownership Interest
Carmen Matias	General Partner	51%
Andrew N. Wimbish	General Partner	49%

Matias/Wimbish Ex. 1, p. 1; Ex. 2, p. 1.

The only written understanding concerning the structure of the partnership is a February 18, 1985 letter from Ms. Matias to Mr. Wimbish. The letter states that the parties are general partners, describes their respective shares, and expresses an agreement that both parties will leave their present positions to devote their full time to the station if they are granted a construction permit. Tr. 311. This letter is the only formal documentation of the partnership's existence. Tr. 362.

50. Ms. Matias testified that her 51 percent share of the partnership entitles her to 51 percent of the responsibility in the station's operation. She also stated that profits would be reinvested in the station for programming equipment and community programs. Tr. 314, 368-369. Further, some profits would be used to pay the partners' salaries. Tr. 369.

51. Ms. Matias and Mr. Wimbish testified that Matias and Wimbish intends to incorporate after Matias and Wimbish is granted a construction permit. Tr. 311-312, 376, 413-414. Beyond discussions of intent to incorporate, however, Matias and Wimbish has taken no steps to form a corporation. Tr. 312-315, 376.

52. Carmen Matias proposes to serve full time (a minimum of 40 hours per week) as the General Manger of Matias/Wimbish's proposed station. In that capacity she will direct and supervise the day-to-day operations of the station and its employees. In addition, Ms. Matias will implement and administer the station's equal employment opportunity program. Matias/Wimbish Ex. 1, pp. 3-4; Tr. 343.

53. Ms. Matias is an Hispanic female, born in San Juan, Puerto Rico. In 1976, she received a Bachelor of Arts degree in Communications from Hunter College of the City University of New York. Matias/Wimbish Ex. 1, pp. 1-2. Ms. Matias is currently employed as the Editorial Communications Manager for *The New York Daily News*, where her responsibilities include: the supervision of 12 promotion department copywriters and graphics personnel; promotion of the news editorial product, particularly via broadcast media; serving as media liaison, where Ms. Matias writes and arranges for the distribution of press releases publicizing editorial and corporate developments at the newspaper and is involved in the production of programming for internal use of the company; serving as liaison between the promotion/public relations departments with the newspaper's editorial department; and production of all internal communications and publications including NewsNotes (management letter) and NewsPix (employee news magazine) (since January 1985). Subsequent to January 29, 1986, Ms. Matias has participated in production meetings concerning a seven-part series on the problems and issues related to mass transit to be aired by Channel 5 in New York City as part of a joint venture of Channel 5 and *The New York Daily News*. *Id.* at p. 2; Tr. 345-346. Upon the grant of the construction permit to Matias/Wimbish, Ms. Matias will terminate her present employment and relocate to Conroe, Texas. Matias/Wimbish Ex. 1, p. 4; Tr. 344-345.

54. From September 1982 to April 1983, Ms. Matias was the Producer of Station WOR-TV's (New York, New York -- now Secaucus, New Jersey) daily 60 minute public affairs program "Straight Talk." As Producer, Ms. Matias supervised a 12-person production staff, wrote on-air copy, developed and executed program ideas, was responsible for the operating budget, approved on-location remotes and selected programs for re-broadcast.

55. From March 1983 to May 1984, Ms. Matias was an independent freelance producer of a one-hour television pilot entitled "Women at Work, commissioned by Group W, New York, New York and aired over cable television. In that capacity, Ms. Matias wrote the script, hired the production personnel and supervised ten individuals.

56. From March 1980 to August 1982, Ms. Matias was the Assistant to the President and Liaison for broadcast production activities at Public Broadcasting Station WNET, Channel 13, New York, New York. In that capacity, Ms. Matias was involved in long-term corporate planning, national and metropolitan area programming, project development and underwriting for various programs, and was extensively involved in foreign co-productions and acquisitions. Ms. Matias also served as the management representative to the Corporation for Public Broadcasting (CPB) and Public Broadcasting Service (PBS).

57. From November 1976 to March 1980, Ms. Matias was employed by Station WNEW(TV), (now WNYW(TV)), Channel 5, New York, New York, beginning as a production assistant and working her way up to field producer and, ultimately, the associate producer of "Midday," a daily 90 minute public affairs program produced and aired by the station. Ms. Matias was responsible for the initiation and execution of program topics, the coordination of segments and shows, conducting preliminary guest interviews, writing on-air copy and the scheduling of crew calls.

58. Ms. Matias has been employed as a Media Executive with Howard J. Rubenstein Associates, Inc., a New York City public relations firm where she was responsible for the placement of the firm's clients on media in the tri-state area, and on at least one occasion, assisted in the programming production of a segment featuring the firm's client on a program entitled "P.M. Magazine," which was produced and aired by Channel 5 in New York City (May 1984 to January 1985). Ms. Matias has also freelanced as a media specialist and marketing consultant for various New York City public relations firms where she was responsible

for placing the firm's clients on television and in other media, and special events coordination (March 1983 - March 1984). Matias/Wimbish Ex. 1, pp. 2-3; Tr. 346-349.

59. Andrew N. Wimbish will be employed full time (a minimum of 40 hours per week) as Director of Finance and Administration at Matias/Wimbish's proposed station. In that capacity Mr. Wimbish will establish and implement the fiscal policies of the station and he will direct and supervise all aspects of the station's financial operations. Mr. Wimbish will report to Ms. Matias, the station's General Manager. Matias/Wimbish Ex. 2, pp. 4-5; Tr. 343-344; 396-397; 414-415.

60. Mr. Wimbish is a black American male, born in Pittsburgh, Pennsylvania. Since July 1980, Mr. Wimbish has resided in Houston, Texas, within the proposed service area of Matias/Wimbish's station. In 1978, Mr. Wimbish received a Bachelor of Science degree in Accounting from Point Park College, Pittsburgh, Pennsylvania. Since August, 1985, Mr. Wimbish has been self-employed as a certified public accountant in Houston. Upon the grant of the construction permit to Matias/Wimbish, Mr. Wimbish will terminate his self-employment activities and relocate to Conroe, Texas. Matias/Wimbish Ex. 2, pp. 1-2, 5; Tr. 377-378, 394, 409.

61. Prior to August 1985 and for approximately nine years (since 1976), Mr. Wimbish was employed by Gulf Oil Corporation, Houston, Texas in various financial and financial management positions. Following the acquisition of Gulf by Chevron, Mr. Wimbish declined an employment opportunity with the merged company which would have required Mr. Wimbish and his family to relocate to San Francisco. Matias/Wimbish E. 2, p. 2; Tr. 377-378.

62. From 1982 until August 1985, Mr. Wimbish held the position of Supervisor of Management Reporting and Control for Gulf's International Trading and Marine Sales Division. In that position, Mr. Wimbish directly supervised five employees and was responsible for the review and consolidation of sales and earnings of subsidiaries for presentation to senior corporate management: establishing standards and controls for recording and reporting of company transactions and assets; and developing financial information for management in order to facilitate the monitoring and control of operations.

63. From 1980 to 1982, Mr. Wimbish held the position of Supervisor for Gulf's Control Unit, in Houston. In that capacity, Mr. Wimbish directly supervised four employees and directed, interpreted and coordinated work assignments in accounts receivables, general ledgers and data control.

64. From 1979 to 1980, Mr. Wimbish was a Senior Accountant for Gulf in Pittsburgh, Pennsylvania, supervising six employees in the preparation of marine fuel billings to Gulf's customers worldwide. Mr. Wimbish's responsibilities also included the formulation and submission of year-end financial statements and tax receipts. From 1976 to 1979, Mr. Wimbish was a Junior Accountant for Gulf, also in Pittsburgh. From 1974 to 1976, he was employed as an accountant with Koppers Company, Inc., Pittsburgh, Pennsylvania. Matias/Wimbish Ex. 2, pp. 2-3; Tr. 377-378.

65. Mr. Wimbish has been active in the following civic and community activities in Houston, Texas, located within the proposed service area of Matias/Wimbish's station:

Member, National Association of Black Accountants, Houston Chapter (1984 to present). Projects undertaken include free income tax return assistance to low income taxpayers (one hour per week during tax season); sponsoring of a Christmas party for disadvantaged children (one hour a week during Christmas); assistance with the Toys-for-Tots program.

United Way Campaign -- solicited funds for years 1982 and 1983 (one hour each day during campaign period -- August to September).

Member, Northglen Civic Association, Financial Committee -- the committee meets and discusses the financial development of the Northglen neighborhood of Houston (part of the northwest section of Houston where Mr. Wimbish resides) (one hour per week, 1986 to present).

American Heart Association, Houston Chapter -- solicited funds during 1984 (one hour per week during campaign period -- approximately a one to two-month period).

Member, Progressive Missionary Baptist Church (1985 to present).

Subject to Mr. Wimbish's full time commitment to work at the proposed station, Mr. Wimbish will remain active in the National Association of Black Accountants and the Progressive Missionary Baptist Church and develop new civic and community interests in Conroe, devoting a minimum average of one to two hours each week to the foregoing activities. Matias/Wimbish Ex. 2, pp. 3-3; Tr. 393-394, 402-403.

D. Conroe Broadcasting

66. Conroe Broadcasting is a limited partnership consisting of three partners. Roosevelt Moore, a black male, is the general partner; he holds a 20% ownership interest. The limited partners, Shelby Gillam and Ernest G. McClellan, each hold a 40% ownership interest. (Conroe Broadcasting Ex. 1).

67. Neither Conroe Broadcasting nor Mr. Moore, the general partner, has existing ownership in or control over any medium of mass communications. (Conroe Broadcasting Ex. 1).

68. At the time of hearing, Mr. Gillam was the President and Mr. McClellan was the Vice-President of the Wayside Temple; both men were also directors of that organization. The Wayside Temple is the 100% shareholder of Christian Faith Broadcast, Inc. At the time of hearing Mr. Gillam was President, Mr. McClellan was Vice-President, and both men were directors of that corporation. Christian Faith Broadcast, Inc. is the licensee of WGGN(FM), Castalia, Ohio; the licensee of WGGN-TV, Sandusky, Ohio; and the permittee of WLLA(TV), Kalamazoo, Michigan. (Conroe Broadcasting Ex. 1).

69. In the event that the Conroe Broadcasting application is granted, Mr. Moore will be integrated into the day-to-day management of the television station on a full-time basis (at least 40 hours a week) as Director of Public Affairs and Religious Programming. Mr. Moore will cease his current civic and preaching activities as well as retire from his current full-time employment with the Ford Motor Company to devote full-time to the station. (Conroe Broadcasting Ex. 2A at para. 4).

70. In his position as Director of Public Affairs and Religious Programming at the station, Mr. Moore will oversee ascertainment of community problems, needs, and interests, as well as production of responsive religious and public affairs programming. Mr. Moore will hire and supervise a staff to work with in ascertaining these needs and producing this programming. (Conroe Broadcasting Ex. 2A at para. 4). In addition, Mr. Moore will be responsible for management and policy-making at the station. Mr. Moore expects to hire a general manager to supervise other areas of station operations. (Conroe Broadcasting Ex. 2A at para. 4). Mr. Moore was a deacon at the Providence Baptist Church in Sandusky, Ohio, until 1966. From 1971 to 1979, Mr. Moore held the position of deacon at the Chapel Hill Church in Detroit, and was superintendent of the Sunday School there. In 1979, Mr. Moore was promoted to Associate Pastor. In 1980, Mr. Moore left his position at Chapel Hill Baptist Church to work, on a voluntary basis, with other churches in Detroit. (Conroe Broadcasting Ex. 2A at para. 8).

71. Mr. Moore has served in his present position as the Assistant Pastor at the United Prayer Temple Baptist Church, in Detroit, for the last six months. As Assistant Pastor, he has an opportunity to preach at least once a month. (Conroe Broadcasting Ex. 2A at para. 8). Mr. Moore spends approximately eight hours per week in the position of Assistant Pastor (Tr. 456).

72. Mr. Moore currently serves on the Chaplains' Advisory Committee for the State of Michigan. During his three years of service with the Committee, Mr. Moore has been involved with advising the state on providing religious services to prisons and other facilities in the Michigan penal system. Mr. Moore also serves as a member of the West Side Ministerial Alliance of Detroit. The Ministerial Alliance meets weekly to discuss current issues in Detroit and to work on solutions to resolve problems in the community. (Conroe Broadcasting Ex. 2A at para. 10).

73. In 1980, Mr. Moore organized the Roosevelt Moore Ministries, a non-profit, tax-exempt corporation, which provides counseling and preaching services. The Roosevelt Moore Ministries usually averages a staff of ten volunteers and currently has a staff of 15 volunteers.

74. Mr. Moore has a seasonal automobile repair business which he started in 1975 and which operates during the warmer months of the year (Tr. 488, 491). During those months, he spends on the average about 15 to 20 hours per week on this business and has people working for him, ranging in number from three to seven (Tr. 488-489, 492).

75. Mr. Moore presently resides at 8966 N. Martindale, Detroit, Michigan 48204. If the Conroe Broadcasting application is granted, Mr. Moore will move to and establish a permanent residence at Conroe, Texas. (Conroe Broadcasting Ex. 2A at para. 2).

76. Mr. Moore is producer and host of "Evangelistic Hour." This program airs over WGGN(FM) at Castalia, Ohio, on Sundays from 5-5:30 p.m. and has been broadcast over that station since 1980. He also produces and hosts a television program of the same name. WGGN(TV) at Sandusky, Ohio, schedules that show on Fridays from 7:30-8:00 p.m. and Sundays at noon. WGGN(TV) has carried this show since 1983. Mr. Moore devotes approximately five hours each week to this program. Both WGGN(FM) and WGGN(TV) are licensed to Christian Faith Broadcast, Inc. Although Mr. Moore's material is aired over WGGN(FM & TV), he determines the content of these programs and oversees their production. Mr. Moore is an independent producer not employed by or otherwise connected with these stations. (Conroe Broadcasting Ex. 2A at para. 12; Tr. 460).

77. If the Conroe Broadcasting application is granted, Mr. Moore will cease any involvement with WGGN(FM) and WGGN(TV) (Conroe Broadcasting Ex. 2A at para. 14).

78. For eight months in 1960, Mr. Moore was guest host and assistant in the production of a monthly radio program on WBOK(AM) in New Orleans, Louisiana. That show required a commitment of approximately three hours per week for rehearsal and production. (Conroe Broadcasting Ex. 2A at para. 13; Tr. 461-462).

E. Wood Broadcasting

79. Through the hearing, Wood was a general partnership consisting of three partners. These partners, Curtis A. Wood, Sr. (Dr. Wood), Lou Lee Wood (Mrs. Wood), and Gina Wood, each held a 33-1/3% interest in the partnership. Dr. and Mrs. Wood were husband and wife and Gina Wood is their daughter (Wood Ex. 14).

80. Dr. Wood, who had been proposed as the full-time general manager of Wood's station, died on December 30, 1987. The fact of Dr. Wood's death was reported by amendment filed January 27, 1988.

81. Wood's Partnership Agreement contains this provision:

> "16. *Effect of Partner's Death.* If one of the partners dies, the survivors may either purchase the deceased partner's interest or terminate and liquidate the partnership.

Wood has given no indication that an election has been made in accordance with that provision.

82. Mrs. Wood proposes to be integrated in the day-to-day operation and management of the television station on a full-time basis (at least 40 hours a week) for an indefinite period of time as the Director of Personnel. She will be responsible for all personnel matters, including hiring, with the assistance of the other two partners, Dr. Wood and Gina Wood. (Wood Ex. 15 at para. 14).

83. Gina Wood proposes to be integrated into the day-to-day management of the television station as the Station Manager, in charge of all daily program operations, including overall supervision of the preparation, presentation, and scheduling of programming. She proposes to work at the station on a full-time basis. (Wood Ex. 16 at para. 14).

84. Gina Wood proposes to resume her permanent residence in Prairie View if the Wood application is granted (Wood Ex. 16 at para. 2; Tr. 981). She intends to live with her parents during the time she is working at the proposed station (Tr. 961).

85. Since 1950, Mrs. Wood has been involved with the St. Francis Episcopal Church in Prairie View, assisting with the Episcopal Young Churchmen and the Women of the Church Organization. From 1980-85, she served as a hospital aide at the Waller County Memorial Hospital in Hempstead, Texas. From 1975 to the present, Mrs. Wood served as a worker in the Waller County school elections, as well as the regular city and county elections for Waller

County. (Wood Ex. 15 at paras. 7-9). In addition, Mrs. Wood is a member of the Alpha Kappa Alpha Sorority and has worked with committees of that sorority's local chapter in Prairie View (Tr. 734-735).

86. Mrs. Wood is a black female, and Gina Wood is a black female.

87. Gina Wood is presently working to complete a B.A. degree in communications at Prairie View A&M University (Wood Ex. 16). From January to May 1986, she worked at WRC-TV, Washington, D.C., as an intern, assisting in the production of programming (Wood Ex. 16 at para. 6; Tr. 964). From July to December 1985, Gina Wood was an intern with Ted Bates Advertising in New York, at which firm she assisted account executives with product research (Wood Ex. 16). From July 1983 to June 1985, she worked at noncommercial station KPVU-FM as a news producer and anchor for two daily newscasts (Wood Ex. 16 at para. 8; Tr. 966, 970). During that period, she worked at the station three to five days per week (Tr. 966). From July 1983 to August 1984, she also worked as a disc jockey at that station, hosting a morning jazz program from two to five days per week.

Financial Issue

88. Garland Wood, son of Dr. and Mrs. Wood, indicated that he and Wood had several discussions concerning financial assistance that he would render if Wood was awarded the Conroe permit. Garland Wood understood that Wood would need as much as1,500,000, or possibly more, to construct the Conroe television station and to operate it for at least three months without revenue. Garland Wood indicated that he had committed himself to provide to the applicant the necessary financing, and claims he is still so committed. (Wood Ex. 12).

89. Garland Wood intends to supply the necessary funds from his personal financial holdings or, "if it proves to be more appropriate at the time," intends to use his investment banking experience to arrange for all or part of the necessary financing. He indicated that, if necessary, he will personally finance the construction and operation of the station. Such personal financing would be in the form of loans to Wood. Garland Wood is employed at Goldman Sachs & Co. (Wood Ex. 12).

90. A statement of Garland Wood's personal assets and liabilities was submitted as Wood Ex. 12A and is as follows:

FINANCIAL STATEMENT FOR GARLAND WOOD

As of May 1, 1986

STATEMENT OF ASSETS & LIABILITIES

ASSETS	
Securities (Purchase Price)	150,000
Cash (at GS & Co. & Citibank Money Market Account)	460,000
Vested Profit Sharing Account - Held by Goldman Sachs & Co. (Primarily Contributed by Wood)	390,000
Real Estate Property (estimated market value)	2,000,000
Personal Property (estimated market or replacement)	100,000
Auto	43,000
Stone Street Fund	10,000
Personal Loan	40,000
	3,193,000
LIABILITIES	
Mortgages	140,000
Auto Loan	20,000
Credit Cards	8,000
	168,000
NET WORTH	**3,025,000**

91. Garland Wood's real estate holdings consist of seven residential properties – five in Manhattan and two in the U.S. Virgin Islands (Tr. 262). These properties are subject to four mortgages, totalling 140,000 (Wood Ex. 12A; Tr. 262-263). One of Garland Wood's properties is both his personal residence and a rental property, which he estimates to be worth 400,000 (Tr. 267).

92. Garland Wood personally estimated his personal property to be worth100,000; he did not have it appraised (Tr. 268). The Stone Street Fund is a venture capital fund from which Garland Wood believes that he cannot withdraw funds (Tr. 269, 288). The40,000 personal loan that is listed as an asset is fully outstanding, as repayment has not yet begun (Tr. 269-270). The term of that loan is five years.

93. Garland Wood has a current liability of2,600 per month on his real estate mortgages and680 per month for his automobile loan (Tr. 291).

94. Dr. Wood had indicated to Garland Wood that the size of the required commitment to Wood "could be anywhere from1 million to3 million (Tr. 259). Although Dr. Wood did not indicate to his son the basis for the sums that he was talking about, Dr. Wood's estimate appears to rest only on his claim that he "teach[es]" communications, and I do know something about what costs are involved in doing this type of thing" (Tr. 795). Garland Wood and his father did not discuss any terms of a direct loan from Garland Wood for the Conroe venture (Tr. 261) and, at present, there is no agreement on specific terms of such financing (Tr. 863-864). Although Garland Wood indicated that he might rely on third parties to finance the proposed station, he did not and does not have any specific third parties in mind (Tr. 261-262).

95. Garland Wood does not know if the Wood application was filed before or after his initial conversation with his father regarding financing the proposed station (Tr. 262). In any event, there was no discussion with Garland Wood prior to the filing of Wood's application regarding the form of the financing (Tr. 793-794) or the precise amounts involved (Tr. 795). Garland Wood stated that his loan to his father would only be secured by his father's general credit (Tr. 262-263). In addition, Garland Wood has done nothing to assure himself that the Conroe venture is financially reasonable (Tr. 264-265). Finally, Garland Wood has not discussed his "net liquid assets" with

his parents and does not know what "net liquid assets" are in connection with a Commission proceeding (Tr. 291-292).

96. On or about April 17, 1986, Larry Edler and Company was retained by Wood to prepare a study to determine the estimated start-up costs of building and operating a television station for three months that would provide commercial independent broadcast service to Conroe and the surrounding communities (Wood Ex. 13 at 2; Tr. 579). The Edler study concludes that 1,041,655 would be necessary (Wood Ex. 13 at 5; Tr. 552-553).

97. Mr. Edler had not spoken with Mrs. Wood or Gina Wood prior to presenting the completed study to Wood (Tr. 1086). Prior to the time that the Wood application was filed, Dr. Wood had not developed a budget for the proposed station's construction costs (Tr. 798). Furthermore, he did not have any documentation as to the anticipated costs (Tr. 799). Dr. Wood has not provided any financial statements to Garland Wood, to any financial institution, or to any leasing company in connection with the application (Tr. 887-888). Finally, Dr. Wood could not state that Mr. Edler's study included all essential equipment and personnel for the proposed station (Tr. 899-900).

Air Hazard Issue

98. The Federal Aviation Administration (FAA) has determined that the construction of Wood's proposed tower for Channel 55 will pose no hazard to air navigation (Wood Ex. 14, Determination of No Hazard to Air Navigation).

F. G-A Communications

99. G-A Communications, Inc. (G-A) is a Virginia corporation having two types of common stock. Series A common stock is voting stock. Series B common stock is nonvoting stock (G-A Ex. 1). Jo Ann Garcia is the president, secretary, treasurer, the only director, and the owner of 100% of the outstanding series A common stock, representing 20% of the equity. Elizabeth Anderson owns 100% of the outstanding series B common stock, representing 80% of the equity.

100. Jo Ann Garcia proposes to work full-time (At least 40 hours per week) as General Manager of the station (G-A Ex. 2). Ms. Garcia will perform all of the duties commonly associated with the position of general manager including supervising all department heads and determining station policy. Ms. Garcia is an Hispanic-American female.

101. Ms. Garcia resides in Houston, Texas. She has resided within the Grade B contour of the proposed station at various addresses in the greater Houston area from September 1962 to June 1972, and from July 1975 to the present (G-A Ex. 2).

102. Ms. Garcia has been employed since 1983 as a Residency Coordinator and Administrative Secretary at the Cullen Eye Institute in Houston (G-A Ex. 1).

103. Ms. Garcia has participated in civic activities within the Grade B service area of the proposed station. Between 1970 and 1971, she served as a Boy Scout Den Mother. In 1969, 1970 and 1971, Ms. Garcia was a Girl Scout leader. She volunteered as an art instructor and playground supervisor with the West University Public Schools from 1968 to 1971 (G-A Ex. 2). In 1975, Ms. Garcia was the Chairperson for the Annual Bazaar of the Holy Ghost Catholic Church in Houston. Ms. Garcia was President of the Condit Elementary School Parent Teacher Organization in Houston for the 1976-1977 school year. Since 1975, Ms. Garcia has volunteered her time as an English tutor to immigrants in the Houston area. She has devoted as much as eight hours per week to this activity. Presently, she tutors approximately four hours per month.

104. Ms. Garcia has known Elizabeth Anderson for six and one-half years. Tr. 996. Ms. Anderson initially loaned money to Ms. Garcia to help fund the prosecution of G-A's application. At the time G-A's application was filed, Ms. Anderson made a firm commitment to loan money to Ms. Garcia for this venture. Ms. Anderson's loan was later converted to her stock interest. (Tr. 1039-1041).

105. Ms. Anderson, as a nonvoting shareholder, will have no involvement in the day-to-day operation of the proposed station. (Tr. 1031, 1034). In late 1985 or early 1986, Ms. Garcia and Ms. Anderson held discussions regarding the conversion of Ms. Anderson's loans into shares of stock. (Tr. 996). Ms. Anderson's loan was converted to stock and nonvoting stock was issued on March 17, 1986. (Tr. 1017-1018). Ms. Anderson agreed to loan money to G-A equal to her 80% equity ownership. It is the parties' intent that as long as Ms. Anderson contributes 80% of the capital to G-A, she will own an 80% equity interest in G-A. (Tr. 1024-1025, 1049).

Air Hazard Issue

106. The FAA has issued a "Determination of No Hazard to Air Navigation" with respect to G-A's proposed construction. (G-A Ex. 3).

Real - Party - in Interest Issue

Jo Ann Garcia's Testimony

107. Jo Ann Garcia, G-A's president and owner of all of the outstanding voting stock, first learned about the availability of a television station in Conroe, Texas, from her friends, Robert and Elizabeth Anderson. (G-A Exhibit 4). Ms. Garcia and Ms. Anderson had several conversations concerning the prospect of their joining together to form an applicant entity. Ms. Anderson told Ms. Garcia that she did not wish to be actively involved in the operation of such a project. Ms. Garcia suggested that they form a corporation, with Ms. Anderson owning non-voting stock. While Ms. Anderson indicated that she would consider that option, initially she did not purchase stock, but instead lent money to Ms. Garcia to prepare and file the application.

108. Ms. Garcia knew that she would need professional assistance, but did not know where to obtain it. From discussions with Ms. Anderson, she learned that Ms. Anderson's brother, Richard Ozan, recommended a communications attorney in Washington, D.C., named Thomas Root.

109. Ms. Garcia contacted Mr. Root, who then sent her an applicant questionnaire and a blank Form 301. She completed both of these forms, and returned them to Mr. Root.

110. G-A's application was filed on November 29, 1984, indicating Ms. Garcia as the only voting stockholder and Ms. Anderson as a potential future non-voting stockholder. On April 1, 1986, an amendment was filed to report that Ms. Anderson had indeed purchased non-voting stock. Ms. Garcia testified that this ownership structure, as

reported in the amended application, is accurate and complete. Further, she testified that no other person has ever held any ownership interest in G-A, that no such interest has ever been offered to any other person, and that no other person has ever been invited to become a principal of G-A. Ms. Garcia also testified that all funds used in the preparation and prosecution of G-A's application has come from contributions made by herself or by Ms. Anderson. No funds have come from any other source.

111. Ms. Garcia felt that she had reason to be dissatisfied with the services provided by Mr. Root. The application form as prepared by Mr. Root's office referred to the applicant variously as "G-A Communications, Inc." and "G-A Corporation." Although Mr. Root promised to prepare an amendment to correct this, he failed to do so. Mr. Root failed to relay to Ms. Garcia information concerning a January 1985 objection to the G-A application which had been filed by the Association of Maximum Service Telecasters, Inc., complaining that G-A's proposed station would be short-spaced to another station. Mr. Root had indicated that he would prepare an amendment to improve G-A's comparative case, but he never did. Ms. Garcia generally felt that Mr. Root had failed to communicate with her about the progress and status of her application. These circumstances led Ms. Garcia to seek new counsel.

112. Upon learning that the original G-A transmitter site was short-spaced, Ms. Garcia engaged an engineer to prepare an amendment to specify a new site. She went to Conroe, located a new site, and negotiated for its use. When the amendment was completed, she hand-carried it to Washington to be filed with the Federal Communications Commission.

113. Ms. Garcia located and arranged for the financial commitment which became the basis for G-A's certification of financial qualification.

114. Ms. Garcia has met Ms. Anderson's brother, Richard Ozan on only one occasion. That was in December 1985, when he and his wife came to lunch with Ms. Garcia and Ms. Anderson. The four of them socialized and chatted about a wide range of subjects. The existence of G-A's application was discussed briefly and only incidentally.

115. Parties pressing the real-party-in-interest issue against G-A rely on certain testimony given by Mr. Root in the Blanco, Texas, proceeding. *Opal Chadwell, et al.* (Initial Decision), FCC 860-59, released October 22, 1986. So much of that testimony as is pertinent here, and which has been offered and received in evidence as recorded past recollection, is set forth immediately below.

Testimony of Thomas Root

116. Jo Ann Garcia did not ask Mr. Root to incorporate G-A Communications in the State of Texas (Tr. 1443-44). Root prepared the engineering for the Conroe application (Tr. 1452). It was Mr. Root's understanding, at some point, that Richard Ozan desired to pursue the Conroe application; that understanding was based on what Root had been told by Mr. Ronald Baptist (Tr. 1476).

117. Root understood, at some point, that Ozan was involved in the structuring of the applicant, that he was serving as a consultant to G-A, and that Ozan "would get his money in the back end when they were financed" (Tr. 1483-84).

118. Root received some of the information for the Conroe application by telephone from Mr. Ozan (Tr. 1484-87). Root suggested to Ozan that the corporation have an issue of non-voting stock (Tr. 1505-06). The information concerning G-A's financial capacity which was included in the application was given to Root by Mr. Ozan (Tr. 1507). The information concerning the organization of the applicant came entirely from Ozan (Tr. 1509).

119. Root sent an application form concerning Conroe to Mr. Ozan in November 1984, "Because Mr. Ozan was the gentleman who had ordered the work, and, according to Mr. Baptist, Mr. Ozan was the man who was getting the applicants put together" (Tr. 1495-96).

120. When testifying in the instant proceeding, Mr. Root had "no recall" of a good many things. He was very careful to say that his answer, "I don't recall," means simply that he is unable to say whether the fact about which he is being questioned did or did not occur; it may or may not have occurred (Tr. 1533).

121. Mr. Root was "unable to recall" whether he had ever met or communicated with Ms. Garcia prior to the B cutoff date in this proceeding (Tr. 1437; 1451; 1453; 1454-57). Root did not know whether he communicated only with Ozan (and not Garcia or Anderson) before the application was filed. He did not know whether the information in the application was supplied to him by Ozan or came from some other source (Tr. 1433). He had no independent recollection with respect to whether Ms. Garcia returned to him an application that she had in fact signed (Tr. 1437). He did not know whether he sent a blank Form 301 to Ms. Garcia, or to Ozan (Tr. 1438). He did not know whether he knew, on or about November 7, 1984, who was the president of G-A (Tr. 1440-41). He did not know whether he was ever requested to incorporate G-A, by either Ozan or Garcia (Tr. 1442). He did not know where he got the information respecting the financial qualifications of the applicant that was included in the application (Tr. 1446). Mr. Root did not know where the information which led to the notation in the application that G-A was a "Corporation in process of being formed," came from (Tr. 1449-50). He did not know whether he was asked to prepare the engineering for the Conroe application (Tr. 1451).

122. Mr. Root did not know whether he ever had any conversations with Garcia or Anderson about the name of the applicant (Tr. 1453). He did not know whether he sent Garcia a qualifications questionnaire, or whether he got one in completed form back from her (Tr. 1455-56). Root did not know whether he received a handwritten draft Form 301 from Garcia (Tr. 1457). He did not know whether he ever spoke to Garcia (Tr. 1459). He did not know whether he ever explained to G-A the requirement to publish local notice in the newspaper (Tr. 1459), or to maintain a public file (Tr. 1460). He did not know whether he had ever billed G-A for the publication of local notice (Tr. 1460). He did not know whether he heard from Garcia that Donald Martin would be providing legal representation for G-A (Tr. 1472). He did not know why he sent a certain November 7, 1984 letter to Mr. Ozan (Tr. 1478; 1495-96).

123. Mr. Root did not know whether he looked to Ozan for the information necessary to complete the Conroe application (Tr. 1481). He did not know where he got the information for inclusion in the application that Jo Ann Garcia would be responsible for the administration and

implementation of the Equal Employment Opportunity Program (Tr. 1488). He did not know whether he ever discussed G-A's proposed transmitter site with any G-A principals (Tr. 1490).

124. Mr. Root did not know whether he ever discussed the Commission standard of "reasonable assurance" of site availability with any G-A principal (Tr. 1490-91). He did not know when he first met Ms. Garcia (Tr. 1493). He did not know whether just prior to the filing of the application, his client was Ozan or G-A (Tr. 1500-01). Root did not know whether he had any contact at all with Garcia, even by telephone, before the Conroe application was filed (Tr. 1501-02). He did not know whether he ever acted upon the instruction of anyone other than Ozan with respect to the Conroe application (Tr. 1513-14). He did not know whether Ms. Garcia telephoned him and terminated his services (Tr. 1520). He did not know whether he received a1,000 check from Anderson for services at the same time the completed application was returned to him (Tr. 1530). He did not know whether he ever sent an invoice to any G-A principal (Tr. 1530). He did not know whether, upon the filing of the Conroe application, he also sent a copy of that application to anyone (Tr. 1545-46). Finally, Root did not know whether he ever discussed with Garcia the need for G-A to seek a superior comparative position (Tr. 1548).

125. Mr. Root was able to testify that he never received any money from Mr. Ozan in payment for services performed for G-A (Tr. 1430). The only payment Mr. Root received in connection with the G-A application came from Ms. Anderson (Tr. 1481). Root also testified that he prepared the application form for G-A and sent it to Ms. Garcia for her signature. It was returned to him with a signature purporting to be that of Ms. Garcia (Tr. 1436).

Comparative Coverage Issue

126. Following are the total areas and populations which the applicants will cover with their respective Grade B contours:

	Grade B	
	Area Sq. Mi.	Population
DBLS Incorporated (DBLS)	4,787	935,125
Imagists	8,381	2,730,210
Matias and Wimbish (M&W)	6,908	1,916,047
Conroe Broadcasting (Conroe)	7,106	2,449,207
Wood Broadcasting (Wood)	6,365	1,650,641
G-A	5,415	2,579,360

127. None of the applicants will provide a first service to any area. Following are the areas and populations to which the applicants will provide a second through fifth service.

	2nd Service Area		3rd Service Area		4th Service Area		5th Service Area	
Applicant	Sq. Mi.	Pop.	Sq. Mi.	Pop.	Sq. Mi.	Pop.	Sq. Mi.	Pop.
DBLS	12	70	782	38,869	451	6,528	610	16,941
Imagists	83	4,215	1,592	126,769	777	31,820	730	19,916
M&W[1]	100	717	1,328	120,429	720	31,250	690	18,389
Conroe	43	314	1,066	97,601	617	20,969	712	19,374
Wood	75	586	1,166	117,995	640	29,463	640	17,389
G-A	0	0	45	24,853	272	4,585	583	16,397

III. CONCLUSIONS OF LAW
(a) Qualifying Issues

Matias and Wimbish

Section 73.610 Issue/Air Hazard Issue

128. On April 14, 1986, Matias/Wimbish filed an amendment to its application specifying a transmitter site in compliance with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules. Matias/Wimbish was there proposing a tower height of 1,150 feet, and Federal Aviation Administration (FAA) approval for a tower of that height was made to appear to be routine. More specifically, Matias/Wimbish proposed to locate its tower close to that of Wood Broadcasting; it claimed to be proposing a tower approximately equal in height to that proposed by Wood, and Matias/Wimbish expressed its belief that the FAA had already issued a "no hazard determination respecting Wood's proposal. In light of all this, Matias/Wimbish concluded that FAA approval of its proposal "is expected within the next few weeks".

129. The Matias/Wimbish amendment was accepted as announced at hearing on May 13, 1986. Matias/Wimbish subsequently learned that it was mistaken in its belief that the FAA had approved a 1,150 foot tower height for Wood; in fact, Wood's approved tower height is approximately 754 feet. The FAA informed Matias/Wimbish that it would not approve a 1,150 foot tower, but that it will approve a tower approximately 750 feet in height. As a result, on May 14, 1986 Matias/Wimbish sought to amend its proposal to reduce its tower height to 750 feet. That Petition for Leave to Amend was denied and the amendment was not accepted (*Order*, FCC 86M-2184, released July 8, 1986). On May 23, 1986, Matias/Wimbish sought summary decision on the short-spacing issue. That motion was summarily denied (*Order*, FCC 86M-2183, released July 8, 1986.

130. By its May 14, 1986 petition, Matias/Wimbish sought only to reduce its antenna height to obtain FAA approval, and it should have been permitted to do so. The petition was rejected because Matias/Wimbish's "significant carelessness" in proposing a 1,150 foot tower in the blind hope that the FAA would approve that height was inconsistent with the notion of unforeseeability. That analysis was in error. Matias/Wimbish's "carelessness had nothing to do with its ability to anticipate the FAA's later-expressed disinclination to approve a 1,150 foot tower. Nothing that Matias/Wimbish did, or failed to do, caused the FAA action to be foreseeable. Until the time of the FAA action, there was a reasonable possibility of FAA clearance (*Women's Broadcasting Coalition*, 59 RR 2d 730) and, consequently, no reason for Matias/Wimbish to have "foreseen" anything else.

131. Good cause is otherwise shown for Matias/Wimbish's May 14, 1986 amendment. The amendment: (a) is not voluntary in nature; (b) confers no com-

parative advantage: (c) does not prejudice any party; (d) does not disrupt the proceeding; (e) does not require the addition of issues or parties; and (f) was diligently filed.

132. *Memorandum Opinion and Order*, FCC 86M-2184 released July 8, 1986, is vacated; the Petition of Carmen Matias and Andrew N. Wimbish, Jointly, for Leave to Amend, filed May 14, 1986 is granted, and the amendment is accepted. *ORDER*, FCC 86M-2183, released July 8, 1986, is also vacated; the Motion for Leave to File Motion for Partial Summary Decision and Motion for Partial Summary Decision, both filed May 23, 1986 by Carmen Matias and Andrew N. Wimbish, Jointly, are granted, and the Section 73.610 issue designated against the applicant is resolved in its favor.

133. The presiding officer officially notices Aeronautical Study No. 86-ASW-0898-OE submitted as Appendix A to the Reply of Matias/Wimbish to Oppositions to Petition for Leave to Amend filed on June 3, 1986. Therein, the FAA approved Matias/Wimbish's transmitter site location and tower height at 750 feet above ground level. The air hazard issue designated against Matias/Wimbish is resolved in its favor.

Wood Broadcasting

134. Wood is relying on the oral commitment of Garland Wood for the funds necessary to construct the station and operate it for three months without revenue. Either before or after the application was filed (the record is not altogether clear on the point), Dr. Wood indicated to Garland Wood that the size of the required commitment "could be anywhere from1 million to3 million." Thus, Garland Wood understood that Wood would need as much as 1,500,000, or possibly more. Garland Wood indicated that he feels firmly bound to his essentially open-ended commitment.

135. Wood prepared no budget or financial plan prior to the filing of its application. Dr. Wood's estimate of1 million to3 million" is based on nothing other than his claim that he "teach[es] communications, and I do know something about what costs are involved in this type of thing".

136. In *Armando Garcia*, FCC 88R-15, released March 7, 1988, the Review Board determined that an applicant's method of estimating costs for a facility was not unreasonable where that applicant relied on detailed cost estimates that had earlier been prepared for a substantially similar facility in a nearby community. In contrast, Wood's method of estimating costs was wholly unreasonable; the estimate rests on an examination of nothing at all. Dr. Wood's estimate of "1 million to3 million" was not the kind of informed estimate that the Commission requires and the Edler study, made long after Wood certified its financial qualifications, does not add legitimacy to what had already been done.

137. In *Armando Garcia*, *supra*, the Review Board explained that the predicate for its disqualification of an applicant in *Las Americas Communications, Inc.*, FCC 86R-65, released November 25, 1986, was a finding that the applicant lacked documentary financial support or other similar evidence that funds would be available. In *Vela Broadcasting Co.*, 2 FCC Rcd 3663 (Rev. Bd. 1987), the Review Board affirmed the disqualification of an applicant where no documentation had been assembled and no financial plan had been established when the applicant made its financial certification. These cases require that Wood be found financially unqualified.

138. Garland Wood made no written communication to Wood about his commitment other than his April 22, 1986 letter (long after Wood certified its financial qualifications) submitted as Wood Ex. 12. Prior to the filing of the application, Wood prepared neither a budget nor a financial plan; it neither developed nor obtained any documentation concerning anticipated construction or operation costs; and it did not review any documentation to satisfy itself of Garland Wood's ability to fulfill his oral commitment to Wood Broadcasting. Wood is not financially qualified.

Air Hazard Issue

139. The FAA has determined that the construction of Wood's proposed tower will pose no hazard to air navigation. The air hazard issue is resolved in favor of Wood Broadcasting.

G - A Communications

Real - Party - In - Interest Issue

140. The real-party-in-interest allegations stem largely from the decision in *Opal Chadwell*, *supra*, where Richard Ozan was found to be an undisclosed real-party-in-interest to the application of his sisters, Dorothy Schalze and Deborah Brigham, for a television construction permit at Blanco, Texas.

141. In *KOWL, Inc.*, 49 FCC 2d 962, the Review Board stated:

> "The test for determining whether a third person is a real-party-in-interest is whether that person has an ownership interest or is or will be in a position to actually or potentially control the operation of the station".

142. Conroe Broadcasting offered the testimony of Mr. Thomas Root on this matter. That testimony utterly fails to show that Richard Ozan, Ronald Baptist, or anyone else, is a hidden party to the G-A application.

143. Mr. Root gave very little useful testimony on this issue; he did not know very much at all. In contrast, Ms. Jo Ann Garcia testified in detail about the matter. That testimony is believable, essentially uncontradicted, and is credited here. The record shows that there is no undisclosed real-party-in-interest in G-A, and that no one other than the named principals has any interest in or control over the applicant or the application.

Air Hazard Issue

144. This issue is resolved in G-A's favor, since the FAA has issued the requisite "Determination of No Hazard to Air Navigation.

(b) Standard Comparative Issue

Comparative Coverage

145. In terms of overall areas and population served, Imagists has an advantage over each of the other applicants. This advantage ranges from marginal, vis-a-vis Conroe and G-A, to moderate, vis-a-vis M&W and Wood, to substantial vis-a-vis DLBS. Moreover, while each of the applicants, with the exception of G-A, would provide some second service, Imagist's second service to 4,215 persons is substantially greater than the 717 person which

would receive a second service from the second place applicant, M&W. Imagists also leads each of the other applicants in the provision of third, fourth and fifth services, albeif by relatively small margins. Imagists is entitled to a slight advantage for total coverage over DLBS and Wood. In each case Imagists serves a significantly larger population. Similarly, Conroe, M&W and G-A, which will each provide Grade B service to twice as many people as DLBS, deserve a slight comparative advantage over DLBS. *See Simon Geller*, 90 FCC 2d 250, 268-9, 276 (1982). The largest preferences, however, are traditionally awarded for provision of new first or second (first competitive) service. In this regard, Imagist is entitled to a moderate advantage over each of its competitors for its provision of service to a larger total population and for its provision of a first competitive service to a more significant population. *Christian Broadcasting of Midlands, Inc.*, 99 FCC 2d 578, 582-83 (Rev. Bd. 1984).

DLBS

146. DLBS is entitled to 100% quantitative integration credit for its proposal to integrate its three principals in management positions on a full-time basis. The integration proposal is enhanced to a minor degree by the broadcast experience of the three principals. Slight enhancement is awarded for the proposal of one of DLBS's principals, 1/3 owner Dr. Schwarzwalder, to establish future residence in Conroe, Texas.

147. Dr. Schwarzwalder is one of 23 directors of Capital Broadcasting Association, licensee of non-commerical station KMFA(FM), Austin, Texas. As such, he has some involvement in the making of policy for the station and in its management. A slight diversification demerit will be assessed. *San Joaquin Television Improvement Corp.*, 54 RR 2d 1206.

Imagists

148. Were Imagists a bona fide limited partnership, it would be entitled to an overall quantitative credit of 66 2/3%, based on the full-time participation of its two remaining integrated principals. However, the record in this proceeding clearly establishes that *defacto* control over the applicant rests with the limited partners. Thus, the integration credit due Imagists must be reduced to 2/3% to reflect the 99% ownership of the unintegrated limited partner.

149. When Imagists filed its application, its general partner, Montgomery County Media Network, was owned in equal share by Frank Garza, Alan Rossing, and Rhonda Saldivar. This structure was still in place as of the "B" cut-off date, January 16, 1985. On August 31, 1985, Frank Garza resigned as a principal of Montgomery County Media Network and surrendered his ownership interest. That resignation was reflected in an Imagists' amendment filed on December 30, 1985.

150. Under longstanding Commission case law, "an applicant will not be permitted to retain a comparative advantage if a principal voluntarily withdraws after the time for amending as a matter of right has expired." *Las Misiones De Bejar Television Co.*, 53 RR 2d 119, 123 (Rev. Bd. 1983). In this proceeding, Mr. Garza's resignation, due to personal and work problems (Tr. 157) must be considered as a "voluntary withdrawal." Thus, Mr. Garza's resignation caused a 33 1/3% diminution in Imagists' integration proposal. This diminution cannot be cured by the post-designation increase in ownership of Rhoda Saldivar and Alan Rossing. *Barton Broadcasting Co.*, FCC 86R-31, released May 15, 1986, *Central Texas Broadcasting Co. Ltd.*, 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982). Since Frank Garza's resignation must be held against Imagists, the maximum quantitative integration credit available under normal circumstances would be 66 2/3% for the full-time participation of Saldivar and Rossing.

151. The driving force and controlling principal behind Imagists is Charles Johnson, executive director of the limited partner, HIS. Charles Johnson is the minister of the Evangelistic Temple in Conroe, Texas. (Tr. 171). Under the name of Evangelistic Temple, Mr. Johnson was the original petitioner to have Channel 55 allocated to Conroe. (Tr. 172). Without consulting either Saldivar or Rossing, Johnson decided that Imagists would be structured as a limited partnership. (Tr. 121). In the Articles of Incorporation filed for the general partner, Montgomery County Media Network, Charles Johnson was named as its sole director (Tr. 108), and is still identified as its resident agent. (Tr. 108). The address shown on Imagists' FCC application is "200 Avenue J, Conroe, Texas, 77301," which is the location of the offices of HIS. (Tr. 94). In Imagists' Certification of Limited Partnership, the address shown for the general partner is a post office box rented and used by HIS. (Tr. 95). While Charles Johnson has key to the mailbox, no member of the general partner does. (Tr. 95, 137, 177). Mail received at the post office box is brought to the offices of HIS, where it is opened and reviewed by Charles Johnson or the secretary for HIS. (Tr. 177-78). The public inspection file is kept at the offices of HIS and is maintained by Charles Johnson. (Tr. 141). Mr. Johnson attended all formal meetings of the general partner (Tr. 147-8) and participated in the decision to make Rhonda Saldivar its president. (Tr. 149).

152. Charles Johnson's involvement in the prosecution of the Imagists application is to be contrasted with lack of involvement of Saldivar and Rossing. Both Rossing and Saldivar were invited to join the applicant after Imagists' structure had already been decided upon. Neither Rossing nor Saldivar took part in the preparation and filing of the application or in the hiring of Imagists' communications counsel, consulting engineers, or FAA consultant. (Tr. 92-3, 134-5). Rossing and Saldivar did not know one another prior to the filing of the application. (Tr. 127). Saldivar was invited to join by Charles Johnson's brother, also a director of HIS. (Tr. 89). Rossing was invited to join by Charles Johnson after Johnson learned that Rossing was an American Indian. (Tr. 165). Rossing agreed to help out in whatever way Johnson saw fit, although he had no idea of what his involvement might be and was not told that he would be involved in a managerial capacity at the station.

153. While Saldivar and Rossing have each served as secretary of Montgomery County Media Network, neither has prepared any minutes of its corporate meetings. (Tr. 97-8, 147). The minutes are prepared by the secretary for HIS. (Tr. 97-8). The original minutes are retained by Charles Johnson. (Tr. 148-9). The positions Rossing and Saldivar are to have at the proposed station were decided upon in a conference phone call between Rossing, Saldivar, Charles Johnson and communications counsel. That decision was made in January 1986, a year and two months after the Imagists application was filed. Neither Saldivar nor Rossing played any part in securing FAA

tower approval, which was handled by Charles Johnson's son, Dowen, the Assistant Executive Director for HIS. (Tr. 111).

154. Dr. Saldivar, president of the general partner, did not know what a public inspection file was (Tr. 101-2), did not know how many shares of stock she was entitled to (Tr. 108), and did not know whether money provided by HIS was to be considered a loan or a contribution to capital. (Tr. 113-4).

155. Mr. Rossing did not know whether Imagists had a bank account (Tr. 152), did not know what the general partners' liability would be in a law suit (Tr. 158), and has never received correspondence directly from communications counsel. (Tr. 154).

156. Viewed collectively, the foregoing facts wholly undermine Imagists' representation that it has and will function as a bona fide limited partnership. Saldivar and Rossing have done nothing more than loan their names and minority status to Charles Johnson for his use in obtaining a television station. The contention that Saldivar and Rossing will have exclusive managerial control of the station while Charles Johnson assumes a non-participating role is not believed. "The facts of record overwhelmingly show that [Charles Johnson] has been the dominant individual in [Imagists] up to the present, and there is nothing to suggest that he will suddenly become uncharacteristically inert in the future, other than bald assertions". *Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293, 59 RR 2d 761, (Rev. Bd. 1985).

157. Ultimately, the limited partnership structure of Imagists must be disregarded, and the 99% unintegrated ownership of HIS must be attributed to the applicant for comparative purposes. *NEO Broadcasting Co.*, 60 RR 2d 125 (Rev. Bd. 1986). Since the only two integrated principals of Imagists together own a mere two-thirds of 1 percent, Imagists is only entitled to 2/3% integration credit. The integration proposal is enhanced by Dr. Saldivar's minority status, the fact that she is a female, and by the fact of her residence in Houston, Texas, within the Grade B contour of the proposed station. Additionally, enhancement is awarded for the minority status of Mr. Rossing, and for his local residence.

158. Neither Imagists nor any of its principals has any other media interests, and receives no diversification demerit.

Matias and Wimbish

159. Matias/Wimbish is entitled to 100% quantitative integration credit for the proposal to integrate Ms. Matias and Mr. Wimbish into the management of the station on a full-time basis. The proposal is substantially enhanced by the minority status of both Ms. Matias and Mr. Wimbish. Substantial enhancement is also awarded by virtue of Ms. Matias' status as a female. Additional enhancement of the integration proposal derives from the fact that Mr. Wimbish is presently a resident of Houston, Texas, within the proposed service area, and both he and Ms. Matias propose Conroe, Texas, as their residence in the event of a grant. Finally, the integration proposal is enhanced by Mr. Wimbish's participation in civic activities within the proposed service area, and also by Ms. Matias' broadcast experience.

160. Matias/Wimbish and its individual general partners have no media interests and, therefore, receive no diversification demerit.

Conroe Broadcasting

161. Conroe Broadcasting receives 100% quantitative integration credit for the full-time integration of its general partner, Mr. Roosevelt Moore, as its Director of Public Affairs and Religious Programming. That proposal is substantially enhanced by Mr. Moore's minority status. Slight enhancement is awarded for Mr. Moore's proposal to establish future residence in Conroe, Texas, and his broadcast experience enhances the integration proposal to a minor degree.

162. Conroe Broadcasting has no media interest which are to be attributed to it in a diversification analysis.

Wood Broadcasting

163. Dr. Wood, a one-third owner who had been proposed as Wood Broadcasting Company's general manager, died on December 3, 1987. The fact of Dr. Wood's death was reported by amendment filed January 27, 1988.

164. Even though Commission precedent permits an applicant to substitute another principal for a deceased principal who had been proposed as an integrated owner and to maintain, but not increase, its quantitative integration credit (*Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248-50), Wood has made no such substitution on this record. Wood's quantitative integration credit is reduced to 66 2/3%.

165. The proposal is enhanced by Mrs. Wood's service area residency, her civic activities there, and by her minority and female status. The proposal is also enhanced by Gina Wood's proposed and service area residency, her minority and female status and, very slightly, by her broadcast experience.

166. Wood receives no diversification demerit.

G-A Communications

167. G-A's application was filed in November 1984, at a time when Jo Ann Garcia was its sole principal. The B cut-off date in this proceeding was January 16, 1985. G-A was incorporated in the Commonwealth of Virginia in December 1985. Ms. Garcia received her stock in December 1985. Integration statements were filed on January 29, 1986. Elizabeth Anderson received her stock in March 1986. The fact that G-A was not incorporated until after the B cut-off date does not affect G-A's entitlement to 100% quantitative integration credit for the participation of Ms. Garcia.

168. From the inception of the application until March 17, 1986, when Ms. Anderson acquired her non-voting stock, G-A had only one principal -- Ms. Garcia. She was the only principal named in the application and she remained alone through the time of incorporation. When G-A was incorporated in December 1985, she was still the sole principal of the applicant, owning 100% of the outstanding stock. Thus, her status as the sole principal remained unchanged from the time the application was filed, through the B cut-off date, and through the time of incorporation. Unlike the situations in *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), and *Hispanic Owners, Inc.*, 57 RR 2d 695 (Rev. Bd. 1985), there was only one G-A principal and her status remained constant at all critical times.

169. G-A's 100% quantitative intergration credit is enhanced substantially by Ms. Garcia's status as a member of a racial minority and her status as a female. The proposal is also moderately enhanced by Ms. Garcia's service area residence and her participation in civic activities there.

170. G-A receives no diversification demerit.

Ultimate Conclusions

171. Wood Broadcasting Company is financially unqualified. The quantitative integration credit awarded to Imagists is sufficiently low to remove it from further consideration. DLBS (with its 100% quantitative integration, enhanced slightly by the broadcast experience of its principals, and only very slightly by the proposed local residence of one of its 1/3 owners) suffers a slight diversification demerit and can not prevail over any of the three remaining applicants. Conroe Broadcasting, with its 100% quantitative integration, substantially enhanced by its 100% minority participation but enhanced only slightly by its promise of local residence and broadcast experience, trails both Matias/Wimbish (100% quantitative integration, 100% substantial enhancement for minority status, 50% substantial enhancement for female status, 50% moderate enhancement for service area residency, 100% slight enhancement for promised local residency, 50% slight enhancement for service area civil activities, and 50% slight enhancement for broadcast experience), and G-A Communications (100% quantitative integration, with 100% substantial enhancement for minority status, 100% substantial enhancement for female status, 100% moderate enhancement for service area residency, and 100% slight enhancement for service area civic activities). The enhancement awarded to Matias/Wimbish slightly outweigh those awarded to G-A, making Matias/Wimbish the preferred applicant in this proceeding.

Accordingly, IT IS ORDERED that the applications of DLBS Incorporated, Montgomery County Media Network, Inc. *et al.* d/b/a Imagists, Conroe Broadcasting Limited Partnership, Wood Broadcasting Company, and G-A Communications, Inc., ARE DENIED, and the application of Carmen Matias and Andrew N. Wimbish, Jointly, IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] These figures for M&W do not take into account the fact that its antenna height has been substantially reduced.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-132

In the Matter of

Amendment of Section 73.202(b), RM-6016
Table of Allotments,
FM Broadcast Stations.
(Fort Mohave, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 27, 1988; Released: November 18, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 2004 (1988), proposing the allotment of Channel 296C2 to Fort Mohave, Arizona, as its first local broadcast service, in response to a petition for rule making filed by Ft. Mohave Broadcasting (petitioner).

2. The *Notice* stated that since we could not locate reference coordinates for Fort Mohave in the National Atlas Index, those supplied by petitioner were used to demonstrate that Channel 296C2 could be allotted to Fort Mohave, consistent with the minimum distance spacing requirements of Section 73.207(b) of the Commission's Rules. However, we noted that in the absence of official documentation to establish the boundaries of Fort Mohave, the Commission had no assurance that the requirements of Section 73.315 of the Rules regarding coverage of the proposed service area could be met. Additionally, the *Notice* questioned whether Fort Mohave is a bona fide community for allotment purposes, since it is not listed in the U.S. Census as a census designated place. In light of those factors, petitioner was required to provide additional information addressing our noted concerns, and to demonstrate whether Fort Mohave has businesses, social organizations or governmental units that identify themselves therewith, to establish community status. Petitioner did not respond to the *Notice*.

3. In light of the above, we find that the petitioner has failed to express a continuing interest in the allotment, as required by the *Notice*, and has failed to demonstrate, as requested, that Fort Mohave qualifies as a community for allotment purposes. Therefore, it is not appropriate to allot Channel 296C2 to Fort Mohave.

4. Accordingly, IT IS ORDERED, That the petition of Ft. Mohave Broadcasting requesting the allotment of FM Channel 296C2 to Fort Mohave, Arizona, IS HEREBY DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-525

In the Matter of

Amendment of Section 73.202(b), RM-6475
Table of Allotments,
FM Broadcast Stations.
(Marion, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 27, 1988; Released: November 18, 1988

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Marion Broadcasting Company, Inc. (petitioner), requesting the substitution of FM Channel 236C2 for Channel 236A at Marion, Mississippi.[1] Petitioner also requests modification of its license for Station WQIC(FM) to specify operation on Channel 236C2. Petitioner submitted information in support of the proposal and stated its intention to file an application for the new channel.

2. Channel 236C2 can be allotted to Marion, Mississippi, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the petitioner's specified site.[2] The allotment of Channel 236C2 at Marion would conflict with an application filed by Charisma Radio Partners for Channel 235C2 at Columbus, Mississippi (File No. BPH-880616ME). Channel 236C2 at Marion does not conflict with the reference coordinates of the Columbus allotment (MM Docket 84-231), nor with the three other applications for that allotment. In the event that we allot Channel 236C2 to Marion, Charisma Radio Partners will be permitted to amend its application to specify a non short-spaced site without loss of cut-off protection.

3. We shall propose to modify the license of Station WQIC(FM) to specify operation on Channel 236C2, as requested. In accordance with Section 1.420(g) of the Rules, we shall not accept other expressions of interest.

4. Accordingly, in order to provide Marion with its first wide coverage area service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Marion, Mississippi	236A	236C2

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making to the following:

Charisma Radio Partners
P.O. Box 540327
Orlando, Florida 32854
(applicant for Channel 235C2
at Columbus, Mississippi 880616ME)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 9, 1989,** and reply comments on or before **January 24, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leonard S. Joyce
Blair, Joyce & Silva
1825 "K" Street, N.W.
Washington, D.C. 20006
(Counsel for Marion Broadcasting Company, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] A *Report and Order* was adopted on September 14, 1988, in MM Docket 87-324, which modified the license for Station WQIC(FM), Marion, Mississippi, to specify operation on Channel 236A in lieu of Channel 276A.

[2] The coordinates for Channel 236C2 at Marion are 32-20-00 and 88-44-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-442

In the Matter of

Amendment of Section 73.202(b), RM-4724
Table of Allotments,
FM Broadcast Stations.
(San Clemente, California)

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1988; Released: November 18, 1988

By the Commission:

1. The Commission has before it for consideration two petitions for reconsideration filed by Mount Wilson FM Broadcasters, Inc. (Mount Wilson), licensee of FM Station KKGO, Los Angeles, California, and Eric Chandler Communications of San Diego, Inc. (Eric Chandler), licensee of Station KCBQ-FM, San Diego, California, directed against the Commission action by *Memorandum Opinion and Order*, 2 FCC Rcd. 2514 (1987) which denied review of the action allotting FM Channel 285A to San Clemente, California.[1] Mount Wilson also filed a Supplement and a Further Supplement to its Petition for Reconsideration. Prime Time Broadcasting Limited filed an Opposition to Petition for Reconsideration and Lazy D Enterprises, Inc. filed a Limited Opposition to Petition for Reconsideration.[2] Mount Wilson filed a Reply. [3]

BACKGROUND

2. The *Report and Order* in this proceeding, 50 Fed. Reg. 8226, published March 1, 1985, allotted Channel 285A to San Clemente, California, as its second local service. Both Mount Wilson and Audio House, Inc. (former licensee of Station KCBQ-FM, San Diego) filed comments in opposition to this allotment. In their comments, Mount Wilson and Audio House asserted, *inter alia*, that the only sites complying with the minimum spacing requirements were located on Camp Pendleton but due to objections by Camp officials, these sites would not be available for a proposed transmitter site. In the *Report and Order*, the Mass Media Bureau determined that there was a reasonable likelihood that Camp Pendleton would be available for a transmitter site based on the statement of a Camp official. On July 12, 1985, twelve applications were filed for the allotment.

3. In the *Memorandum Opinion and Order*, Mimeo No. 6281, released August 13, 1986, the Bureau affirmed its action. On April 10, 1987, we affirmed the Bureau by a *Memorandum Opinion and Order* denying applications for review filed by Mount Wilson and Audio House. In that action, we also noted that Camp Pendleton had subsequently determined that it could not approve the construction of a transmitter tower within its boundaries and that as a result, eleven applicants for the allotment requested waiver of our spacing requirements. One applicant (the Hardens) specified a site outside of the Camp complying with the applicable spacing. In the *Memorandum Opinion and Order*, we determined that a waiver for this applicant of the principal city coverage requirement was justified, and afforded the eleven other applicants an opportunity to amend their applications to specify the same non-short spaced site.[4]

4. In support of their petitions for reconsideration, Mount Wilson and Eric Chandler contend that the one site referred to in our earlier *Memorandum Opinion and Order* as complying with the spacing requirements is unavailable for such use. Mount Wilson submits an affidavit from land surveyor as well as letters from Naval and Marine Corps officials indicating that the Hardens' site is located on Camp property and would be unavailable for a transmitter site.[5] In this connection, Mount Wilson and Eric Chandler assert that our *Memorandum Opinion and Order* was based on the availability of the site for the Hardens' application. Since the site is unavailable, these parties argue that the allotment should be deleted.

DISCUSSION

5. We do not believe that the latest arguments advanced by Mount Wilson and Eric Chandler require us to delete the San Clemente allotment. Our *Memorandum Opinion and Order* relied on the existence of the Hardens' site, a site which complied with the minimum spacing requirements and which we believed was located outside of Camp Pendleton. For this reason, there was no basis to delete the allotment. Since the Hardens' site is no longer available, it is now necessary for us to consider the allotment in light of this unavailability.[6] For the reasons discussed below, we are affirming the allotment.

6. At the outset, we would like to emphasize that if we had known or had a reasonable basis to predict prior to the *Report and Order* that the Camp would not approve a broadcast use of Camp property, we would not have allotted this channel. The underlying requirement for an allotment is the reasonable expectation that a useable site is available complying with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. The actual availability of a potential transmitter site complying with the spacing requirements is a matter which can be raised in comments from all interested parties. In the event the issue is raised, we then make a determination on the reasonable likelihood that a site will be available. *Cf. Washington and Wilmington, North Carolina*, 51 RR 2d 1297 (Broadcast Bureau 1982). Such a determination is not obviated by a subsequent event beyond the control of the original proponent or an applicant for the allotment.

7. The allotment to San Clemente was properly made. At the time of the *Report and Order*, the staff determined that there was a reasonable likelihood that a site on Camp Pendleton would be made available for broadcast use. Mount Wilson and Eric Chandler have not demonstrated that this determination was unreasonable. Indeed, a Camp official specifically stated that there was no longer an outright proscription on civilian uses of Camp property and a broadcast use consistent with existing military uses

would be considered. In that context, it was reasonable to assume that Camp Pendleton, containing an area of approximately 125,000 acres, could accommodate both military and civilian uses. Thereafter, the applicants for the allotment made proposals to the Camp in good faith and under the reasonable belief that the proposals could be accommodated. *Cf. Pinckneyville, Illinois*, 41 RR 2d 69 (1977). The fact that Camp Pendleton subsequently determined that it could not accommodate a proposed broadcast use does not negate the reasonableness of the staff's earlier determination or require deletion of the San Clemente allotment.

8. We believe it would be inequitable to the applicants for the San Clemente allotment, under the circumstances, to delete an allotment properly made. As a general rule, once good faith applications are filed for an allotment properly made, we believe any noncompliance with our allocation rules should be evaluated in the context of those applications. To do otherwise would foreclose consideration of applications filed in reliance on a proper Commission determination. Such action would be particularly inequitable in this case, since the information relied on to request deletion of the allotment was developed in the application context as a result of the applicant's own good faith efforts.

9. In the application context, the appropriate procedure is to consider the merits of each waiver request. The threshold showing for a waiver request is that no fully spaced site is available. *Donovan Burke*, 60 RR 2d 110 (1986). *See also Trend Broadcasting, Inc.*, 18 FCC 2d 749 (1969); *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976); and *Megamedia*, 67 FCC 2d 1527 (1978). We have carefully reviewed the eleven applications with waiver requests. The short spacings vary from 4.1 to 6 kilometers. Based upon established Commission criteria for granting waiver requests, these distances are within the range that have been waived in the past. *See, e.g. Megamedia, supra.* In view of the unusual circumstances of this case involving the loss of Camp Pendleton as a transmitter site and the unavailability of the Hardens' site, these waiver requests will be given careful consideration by the staff.

10. Mount Wilson correctly notes that the staff has deleted allotments due to the unavailability of a transmitter site complying with the minimum spacing requirements. *Atlantic City, New Jersey*, 57 RR 2d 1436 (Mass Media Bureau 1985). However, the factual situation in that case is distinguishable and does not provide a justification for deleting the present San Clemente allotment. In *Atlantic City, supra*, the staff allotted the channel based on a specific representation by the petitioner for the allotment that it would file an application for an available offshore site which would comply with the Commission's spacing requirements. Instead, no applicant, including the petitioner, filed for the offshore site even though it remained available as a transmitter site. Upon review, it was determined that since the offshore site was not specified and the allotment would not have been otherwise granted, deletion of the channel was appropriate. In its action deleting the channel, the staff observed that due to a recent allotment, a different channel would be available to applicants desiring to provide a local service to Atlantic City. In the present situation, the applicants made a good faith effort to secure a site at Camp Pendleton which would comply with the minimum spacing requirements, but unlike *Atlantic City*, such sites were rendered unavailable due to circumstances beyond the control of the applicants and no alternative channel is available.

11. For the reasons discussed above, we find that it is in the public interest to go forward now with the consideration of the pending applications for a new local service for San Clemente, California.

12. Accordingly, IT IS ORDERED, That the aforementioned petitions for reconsideration filed by Mount Wilson FM Broadcasters, Inc. and Eric Chandler Communications of San Diego, Inc. ARE DENIED.

13. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public Notice was given on June 18, 1987 (Report No. 1664).

[2] Prime Time Broadcasting Limited and Lazy D Enterprises, Inc. are applicants for the San Clemente allotment. In their opposition pleadings, both parties argue that it is in the public interest to grant their waiver requests of the minimum spacing requirements and consider their applications for a second local service to San Clemente. In addition, Prime Time Broadcasting Limited argues that the present petitions for reconsideration of a Commission action denying an application for review cannot be considered due to Section 1.106(b) of the Rules. We disagree. These petitions for reconsideration will be entertained under Section 1.106(b)(2)(i) and (ii) of the Rules since the issues pertaining to the availability of any site complying with the applicable spacing requirements and referenced in the Commission action arose after these parties had an opportunity to seek Commission review. These issues are the actual ownership of the site and, if the site is on Camp property and unavailable, deletion of the channel.

[3] Three requests by James and Claudia Harden, A Partnership, an applicant for the San Clemente allotment, for an extension of time to file an opposition to the petitions for reconsideration have been denied. In these requests, the Hardens advised the Commission of their ongoing efforts to establish their right to use the transmitter site complying with the spacing requirements. The Hardens have also submitted a late filed Opposition to the petitions for reconsideration and Mount Wilson has submitted a Reply to that Opposition. Both of these pleadings pertain to the ownership of the proposed transmitter site. As discussed in footnote 4, *infra*, since the purported owner of the property has withdrawn its permission, the issues raised in these pleadings need not be considered.

[4] The Hardens proposed a transmitter site adjacent to railroad tracks owned by the Atchison, Topeka and Santa Fe Railroad Company and asserted that they have received approval from the railroad management (File No. BPH 850712VI). Subsequent to our *Memorandum Opinion and Order*, the railroad company withdrew its permission to use railroad property as a transmitter site. Accordingly, it is now necessary for the Hardens to file an appropriate amendment to their application. In this regard, the Hardens have also filed a Motion for Leave to File Amendment

to Rule Making Proceeding requesting that the Channel 285A allotment at San Clemente be based on a separation of 98.6 kilometers with respect to first adjacent channel Station KKGO instead of the required 105 kilometer separation. This is, in essence, a request for waiver of the separation criteria contained in Section 73.207 of the Rules and is appropriately considered at the application stage. Accordingly, the Motion is hereby dismissed.

[5] The Hardens disputed this contention. However, as stated earlier, the Hardens have subsequently informed the Commission that the railroad company has withdrawn its permission to use the purported railroad property. Therefore, the issue of the actual ownership of this property is now moot.

[6] Mount Wilson filed Comments concerning the unavailability of a transmitter site complying with the spacing requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-182

In re Applications of

DOYLAN FORNEY File No. BPCT-850213KF
et. al.

For Construction Permit for a
New UHF Television Station at
Tolleson, Arizona

ORDER

Adopted: November 8, 1988; Released: November 18, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

IT IS ORDERED, That the motion filed by Estrella Communications Limited Partnership on October 14, 1988, for leave to amend its application to report the death of one of its limited partners and to recertify its financial qualifications in the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

GOVERNMENT PRINTING OFFICE: 1988— 242-518/ 00005